Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

October Term, 1998

FRANCES McPHAIL, as Administratrix of the Estate of David Harry McPHAIL, Deceased,

Petitioner,

vs.

MITSUBISHI MOTOR MANUFACTURING OF AMERICA, INC., MITSUBISHI MOTOR SALES OF AMERICA, INC. and VALUE RENT-A-CAR,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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27 pp

QUESTIONS PRESENTED

I. Does the National Traffic and Motor Vehicle Safety Act of 1966, as amended 49 U.S. C. 30101, *et seq.*, require car manufacturers to design and build safer cars, or are the lower courts' correct in transferring this responsibility to the bailees of defective rental cars?

II. Where plaintiff's experts, who are licensed engineers and experienced in accident reconstruction, state that an accident resulted from the failure of a wheel assembly containing a cast iron yoke, and that using steel would be more appropriate and safer, were the Courts correct in granting the defendants a summary judgment?

III. Where an expert's report has been disclosed under Rule 26(a)(2)(B) or (C), does the statement have to be notarized to be considered in responding to a Rule 56 Motion?

IV. Does Rule 26(a)(2)(C) FRCP preserve the right of rebuttal to the plaintiff and provide that plaintiff has a right to contradict or rebut evidence and issues identified by the defendant under paragraph 26(a)(2)(B)?

V. Where defendants have either failed to produce legible documents in making disclosures and, after plaintiff's expert reports are made, produce legible copies, is it an abuse of discretion for a Judge, to refuse plaintiff an opportunity for further investigation and rebuttal testimony?

VI. Do the Federal Rules of Evidence require consideration of out of court statements made by a deceased person and by witnesses who are hostile?

VII. Where a contract is involved in which warranty, or other contractual agreements were made should Federal Courts apply the law of the state in which the act of negligence occurred, or of the state in which the resulting accident happened, in determining issues of breach of implied warranty of suitability for the purpose for which a vehicle was rented?

VIII. In deciding tort liability for a wreck in Alabama caused by a defective rental vehicle, where Federal Courts decide AMELD (strict liability) is inapplicable, should they apply Alabama's negligence and bailment law?

LIST OF PARTIES

The names of all parties to the proceedings in the Court whose judgment is sought to be reviewed here appear in the caption of the case. Mitsubishi Motor Manufacturing of America, Inc., Mitsubishi Motor Sales of America, Inc., and Value Rent-A-Car all appear to be subsidiary companies of a larger company, often referred to as "Mitsubishi". However, under 49 CFR § 579.5 the manufacturer of a vehicle is responsible for any safety related defect determined to exist in a vehicle or in any item of original equipment.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Frances McPhail, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals denying rehearing en banc is not yet entered in the Federal Reporter, it is reproduced in the Appendix filed herewith at Appendix A.

The opinion of the Court of Appeals denying rehearing is not yet reported and is reproduced at Appendix B.

The Opinion of the Court of Appeals affirming the District Court is noted at 141 F.3d 1190, and is reproduced at Appendix C.

The Opinion and Judgment of the District Court are not noted in the Federal Supplements and are reproduced at Appendix D.

The Order of the District Court affirming the Magistrate in Striking portions of Plaintiff's discovery is reproduced at Appendix E.

The Order of the District Court striking Plaintiff's Exhibit 1 is Reproduced at Appendix F.

Plaintiff's Expert Reports (Relevant portions) are reproduced at Appendix I.

STATEMENT OF JURISDICTION

The Court of Appeals entered it's judgment denying rehearing on the 16th day of July, 1998. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

U.S. Constitution, 7th Amendment

[Trial by Jury in Civil Cases]

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Code of Alabama, § 7-2A-106

(1) If the law chosen by the parties to a consumer lease is that of a jurisdiction other than a jurisdiction in which
(a) the lessee resides at the time the lease agreement became enforceable

* * *

(c) the lease is executed by the lessee, the choice is not enforceable.
* * *

Code of Alabama, § 7-2A-212 and Code of Florida § 680.212

(1) Except in a finance lease, a warranty that the goods will be merchantable is implied in a lease contract if the lessor is a merchant with respect to goods of that kind.

(2) Goods to be merchantable must be at least such as:
(a) Pass without objection in the trade under the description in the lease agreement.
* * *
(c) Are fit for the ordinary purposes for which goods of that type are used.
* * *

(3) Other implied warranties may arise from the course of dealing or usage of trade.

Code of Alabama, § 7-2A-213 and Code of Florida § 680.213.

Except in a finance lease, if the lessor at the time the lease contract is made has reason to know of any particular purpose for which the goods are required and that the lessee is relying on the lessor's skill or judgment to select or furnish suitable goods, there is in the lease contract an implied warranty that the goods will be fit for that purpose.

Code of Alabama, § 7-2A-214

* * *

(5) * * * Nothing in subsection (2) or subsection (3)(a) or in § 7-2A-215 shall be construed so as to limit or expand the lessor's liability for damages for injury to the person in the case of consumer goods.

49 CFR § 579.2

The purpose of this part is to facilitate the notification of owners of defective and noncomplying motor vehicles and items of motor vehicle equipment and the remedy of defective and noncomplying vehicles and items of equipment, by equitably apportioning the responsibility for safety related defects and non compliance, with Federal motor vehicle safety standards among manufacturers of motor vehicles and motor vehicle equipment.

49 CFR § 579.5

(a) Each manufacturer of a motor vehicle shall be responsible for any safety related defect or any noncompliance determined to exist in the vehicle or in any item of original equipment.

STATEMENT OF THE CASE

Plaintiff filed a Rule 27 Action in Mobile County, Alabama, against Value Rental, charging that a car rented by the deceased, David McPhail, was defective in construction or design. She charged that these defects caused the steering of the car to fail; the car's yoke was made with material which would not withstand normal and expected impacts and keep the tires in place; and that implied warranties were breached by renting the car with one or more design, manufacturing, or maintenance defects. She also charged wantonness and negligence. Her son, David McPhail, was killed in a wreck when the car went out of control. Mitsubishi intervened claiming to be the owner of the vehicle.

McPhail later filed a wrongful death action including theories of negligence in manufacture or maintenance of the rental car; AMELD (a version of products liability which requires proof of fault); and breach of implied warranty in a lease made in Fla.

The case was removed to the U.S. District Court which ordered that Rules 26(a)(1)(A-D) and 26(a)(2) F.R.C.P. be complied with by Plaintiff tendering expert disclosures within 30 days after discovery cut off and the Defendants within 30 days thereafter.

Plaintiff retained accident reconstruction experts who submitted reports.

Owen Posey stated that the wreck was caused by the failure of the right rear yoke and wheel assembly. Fred Lewter stated that the wreck was caused by the failure of the right rear yoke and wheel assembly and that the knuckle used was not appropriate as it was made of nodular cast iron rather than steel. Billy Mims, stated that the brakes on the vehicle also failed. M.D. Anderson stated that the accident was caused by failure of the right rear wheel assembly. Plaintiff's experts' reports stated that the failure of the right rear wheel assembly was the cause of the accident. Extracts of these reports are set out in Appendix I.

Defendants offered no evidence of any unusual pre accident occurrence which could have caused the yoke to break prior to the accident, and while the car was in McPhail's possession, nor that anyone damaged or altered the vehicle between the time that it was rented to the deceased and the accident. Defendants' experts asserted that the wheel broke as a result of the accident. None of Defendants' experts had been involved in the design of the yoke, or the weld joint holding the shock absorber in place, and all design work was done in Japan by another company.

Among documents relied upon by Plaintiff's experts were laser prints furnished by Defendants which Defendants represented were as good as regular photos. Some had been made shortly after the accident, and before Plaintiff's experts took their photos. Some laser photos of the scene furnished by Defendants were of extreme poor quality. During the deposition of Plaintiff's experts it was disclosed that Defendants had more legible copies of some of the pictures. These disclosed that instead of the three tire marks photographed and measured by Plaintiff's experts, there were four skid marks with the fourth skid mark made by the right rear tire being out of alignment with the other tires, supporting Plaintiff's claim that the wheel assembly failed causing the car to leave the roadway.

Upon being shown these additional documents Plaintiff's expert, Lewter, testified that re examination of the car was needed. Plaintiff obtained permission from the Defendants to reexamine the vehicle and Fred Lewter was accompanied by his associate Al McEachern, whose vitae had previously been given to Defendants, and who had furnished info to defendants in the absence of Lewter.

After inspection of the car, conferring with Lewter, reviewing Plaintiff's other experts' reports, reviewing the Defendants' experts' reports, and the

photos, McEachern wrote a report which was submitted within thirty (30) days after the Defendants' experts submitted their reports. This report contradicted claims made by the Defendants' experts who were claiming the right rear yoke failed when the car flipped or it hit a tree. He stated that the way the car was designed, the assembly could have been defective for a while and failed causing the accident. This reiterated a statement that had been made by Plaintiff's expert, Posey, in his deposition.

When David McPhail rented the car from Value in Florida and drove to Mobile, Alabama, he complained the car was difficult to steer, it made popping noises, that when he applied the brakes the radio and lights would dim, and that the car did not seem right to him. He complained to his mother, his girlfriend, Frankie Young, and to Frankie's fiancee. After the accident Young's fiancee told the navy investigator and Mrs. McPhail about these complaints.

Mrs. McPhail was a passenger in the car and she heard a popping noise and noted the lights going dim when the brakes were applied. After the wreck she was told by Frankie Young that he had problems when he drove the car and that it was difficult to steer. She was also told by a Navy investigator of defects found in investigating the wreck. Mrs. McPhail testified that while complaining about the car David McPhail felt safe in driving it.

It was further disclosed that Frankie Young had filed suit against her and her husband after the wreck, and had married his fiancee. Both he and his fiancee denied any knowledge of defects in the car, and at one point he even denied driving the car. The finance's deposition was inconsistent with statements made by her in an official accident investigation run by the U.S. Navy.

A revised report was made by Anderson after he had examined the new photographs, McEachern's report, and defendants' experts' reports. He repeated that the cause of the accident was the failure of the right rear wheel assembly.

The District Court threw out McEachern's statement and also apparently gave no weight to the Plaintiff's other experts testimony and reports that the failure of the wheel assembly caused the accident.

The Court discarded McPhail's negligence and warranty claims. It never addressed Plaintiff's contention that the vehicle was rented in Florida,

and her citations of authority showing that certain warranties or expectations were created in Florida, which remained applicable when the car was driven to Alabama, and that Alabama's Bailment Law imposed liability for failure of a short-term rental car being used for the purpose for which it was rented.

On appeal, the District Court was affirmed without oral argument. The 11th Circuit upheld the lower Court's assertion that the Plaintiff must show that alternate designs were available to the Defendants which would have made the vehicle safer. Neither Court addressed the Plaintiff's evidence that steel was more appropriate for the peculiar design used by the defendants, or commented on the contention that renting out a defective car was negligence. A Petition for Rehearing was denied without opinion.

REASONS FOR GRANTING THE WRIT

I

The National Highway Traffic and Motor Vehicle Safety Act as amended 49 U.S.C. 30101, *et. seq.*, requires car manufacturers to design and build safer cars. The lower courts erred in transferring this responsibility to bailees of defective cars.

49 U.S. Code § 30101, *et seq.*, and 49 CFR § 579 impose on car manufacturers a duty to design and build safer cars. The rulings by the Lower Courts allow a State to transfer this duty to consumers even though there are numerous suspension designs on the road and the consumer has no way to submit his designs to numerous tests and prove they would pass the Federal Act's standards.

Unless these rulings are addressed and reversed by this Court car manufacturers can use their wealth and power in a state by state effort to defeat responsibility for defectively designed vehicles even though there are already numerous suspension systems on the market. No plaintiff has the resources to conceive, test out and prove to the Secretary the safety or feasibility of a design he comes up with to prove a design defect. In effect the judges and juries become the car's designers.

Some cases which hold contrary to the assertion by the District Court

and the Circuit Court are *Dawson v Chrysler Corporation*, 630 Fed.2d 950 (3rd Cir. 1980), where it was held the judge decided the issue of duty owed by the manufacturer and the jury decides defect and proximate cause; *Lowe v General Motors Corporation*, 624 Fed.2d 1373 (11th Cir. 1980); *Townsend v General Motors Corporation*, 642 So.2d 411 (Ala. 1994); *Atkins v American Motors Corporation*, 335 So.2d 134 (Ala. 1976); *Darcey v Honda Motors Company, Ltd.*, 655 Fed.2d 650 (5th Cir. 1981); *Larson v General Motors Corporation*, 391 Fed.2d 495 (8th Cir. 1968).

Recent Alabama Supreme Court cases have adopted the standard that a good is defective if it does not meet the reasonable expectations of the consumer. *Mueller Co. v Trambeam Corp.*, 693 So.2d 1380 (Ala. Civ. App. 1997); *Graham v Sprout-Waldron and Co.*, 657 So.2d 868 (Ala. 1995). Defendants contend that Plaintiff must tell defendants how to make the product meet reasonable expectations. Alabama does not have such a requirement. In *Moore v Kawasaki Motors Corp. USA*, 703 So.2d 990 (Ala. Civ. App. 1997) the Court declared at page 993, that while any assessment or reconstruction of what caused an accident is necessarily speculative, that alone does not entitle a defendant to Summary Judgment and cited *Peters v Calhoun County Commissioners*, 669 So.2d 847, 851(Ala. 1995). Also see the recent case of *Taylor v. General Motors Corp*, 707 So.2d 198 (Ala.1997), in which a plaintiff had settled with a tire manufacturer, and was allowed to go to the jury under AMELD where a rod in his car allegedly failed. In reviewing a jury verdict for defendant the Court made it clear that Ala. follows *Restatement (Second) of Torts, § 402A*. Thus McPhail could "go to the jury" on showing that when the car was rented it was in an unreasonably dangerous condition, not fit for its expected use because it either had a defective part or a part made with an inappropriate material which failed. These cases only require the showing of a defect, not what caused the part to fail.

If Alabama requires that a plaintiff tell the defendant how to make rental cars safer that law would be preempted by the Federal Act. 49 USC § 30103; *Garcia v. Volvo Europa Truck, N.V.*, 112 F.3d 291 (C.A.1997); 49 CFR § 579.5.

II

Where plaintiff's experts, who are licensed engineers, and experienced in accident reconstruction state that an accident resulted from the

failure of a wheel assembly containing a cast iron yoke and that using steel would be more appropriate and safer the Lower Courts erred in granting the defendants Summary Judgments.

Plaintiff's experts, four of whom are engineers, reported, both before and/or after being furnished additional data and defendants' experts' reports, that the sole cause of the accident was the failure of a right rear wheel assembly, part of which, called a yoke, was made from cast iron rather than steel.

Plaintiff's metallurgist stated that steel would have made the part safer especially in the use of elongated parts and thus showed a safer design was available. This was repeated in McEachern's Report. In studying some of defendants' literature both experts noted that Mitsubishi had just changed from using gray iron to nodular cast iron. Under the reasonable expectation test it does not matter whether the use of cast iron was a manufacturing or design defect. See *Reynolds v Bridgestone Firestone, Inc.*, 989 F.2d 465 (11th Cir 1993) citing Alabama cases.

This case should be reversed with mandate for the Courts to allow a jury to determine whether Mitsubishi is liable if it used a cheaper, less effective part in its vehicles which failed when put to the car's expected use, and allow the jury to weigh the experts' evidence. *Rainey v. Beech Aircraft Corp.*, 827 F.2d 1498, cert. granted 108 S.Ct. 1073, 485 U.S. 903, 99 L.Ed.2d 233, cert. dismissed, *Pratt v. Whitney Canada, Inc. v. Rainey*, 108 S.Ct. 1761, 485 U.S. 994, affirmed in part, reversed in part, 109 S.Ct. 439, 488 U.S. 153, 102 L.Ed.2d 445, on remand 868 F.2d 1531; and *Taylor v. General Motors Corp.*, supra.

III

Where an expert's report is disclosed under Rule 26(a)(2)(B) or (C), it does not have to be notarized to be used in responding to a Rule 56 Motion.

The rulings by the lower courts claim that an expert's statement properly prepared under Rule 26(a)(2) can be rejected when tendered in response to a Rule 56 Motion for Summary Judgment if the statement is not notarized in affidavit form. Rule 26 only requires that the expert's report be prepared and signed by him. *Rainey v. Beech*, supra.

A Motion for Summary Judgment contends that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. This carries Rule 11 implications when the moving party knows that there are genuine issues and he is not entitled to judgment as a matter of law. Also a Motion for Summary Judgement cannot be granted, even if unopposed if a jury could reasonably reject or disregard the contents of the movant's affidavit.

Defendants knew that the reports by Plaintiff's experts showed that the cause of the accident was the failure of the rear right wheel assembly which caused the car to leave the road. The prima facie expert witnesses were all examined in depositions and the basis for their claim that the yoke failed were examined by Defendants' counsel and remained the same.

The Defendants then tendered experts' reports which claimed that the use of cast iron was appropriate and that the knuckle did not break until the vehicle flipped or had hit a tree. Plaintiff offered a rebuttal report from Anderson and a report by Al McEachern, who examined the vehicle after the Defendants had taken the deposition of the other witnesses. McEachern had been previously identified to the defendants several months earlier as assisting Lewter. His signed report was rejected by the Court despite full compliance with Rule 26(a)(2)(C).

Although there remained evidence in the file which sustained Plaintiff's case, the Courts treated McEachern's report as a sine qua non to Plaintiff having made out a prima facia case of failure of the wheel assembly. The issue, of whether an expert's report has to be sworn, affected this case and will effect the outcome of numerous cases and should be reviewed.

IV

Rule 26(a)(2)(C) preserves the right of rebuttal to the plaintiff and allows plaintiffs the right to contradict or rebut evidence and issues identified by the defendant under Rule 26(a)(2)(B).

The District Court treated it's pretrial order as limiting the Plaintiff to filing only expert reports which were filed within thirty (30) days after the close of discovery. It treated efforts by the Plaintiff to file rebuttal expert

reports under Rule 26(a)(2)(C) as violating Rule 56 and struck or disregarded the reports. The Eleventh Circuit upheld this ruling.

The clear wording of Rule 26(a)(2)(C) shows that the drafters intended to preserve the Common Law right of rebuttal which plaintiffs are deemed to have. It states that if the report is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), it has to be filed within thirty (30) days after the disclosures made by the other party.

The Rule requires both parties to supplement when required under Rule 26(e)(1). This imposes a duty to supplement or correct a report to include information thereafter acquired. It states that under subdivision 26(a)(2)(B) the duty extends both to the information contained in the report and to information provided through a deposition of the expert and any additional or other changes to this information shall be disclosed by the time parties disclosures under Rule 26(a)(3) are due.

The rulings of the lower courts mean that Plaintiffs no longer have an absolute right of rebuttal or the right to contradict evidence on a subject matter identified by the other party after the prima facie expert reports have been filed. This is contrary to the intent not only of the FRCP, but to the Rules of the Common Law as adopted into the United States Constitution via the Seventh (VII) Amendment.

Any limitations on the right to offer rebuttal testimony, or proof, warrants review by this Court.

V

Where defendants fail to produce legible documents in making disclosures, and after plaintiff's' expert reports are filed, produce legible copies, it is an abuse of discretion for the Judge, who had restricted plaintiff's discovery, to refuse her an opportunity for further investigation and rebuttal testimony.

Plaintiff attempted to obtain additional data from Defendants through discovery after Defendants made initial disclosures. Defendants objections and refusal to answer were upheld by the Magistrate and his ruling affirmed

on appeal to the Judge, which essentially left Plaintiff with only the documents which Defendants elected to produce. The Defendants, in making Rule 26 disclosures either willfully or inadvertently produced laser prints, which were represented to Plaintiff's counsel as equivalent in quality to pictures that could be made through regular photo process. Some of the photos appeared to be either over-exposed or out of focus which is a common problem in photography. Plaintiff's Experts prepared their reports, based in part upon what details could be discerned from those photos, and on subsequent site photos taken at a later date by one of her experts which showed only three tire marks on an intersecting road and in the grass prior to the car flipping. During examination of Plaintiff's experts, Defendants disclosed they had clear copies of some of the previously unclear photos and referred to them in examining plaintiff's experts.

On being shown the photos Mr. Fred Lewter testified that further examination of the car was necessary. Plaintiff requested the clearer photos from the defendant and they were furnished. One photo showed a fourth tire skid mark which was turned at a different slip angle from the other wheels. An examination of the car was done Mr. Lewter and McEachern. McEachern's report was signed and submitted. A copy of the photograph was also submitted. These were in rebuttal of claims by the defendant. Mr. Anderson, who had previously been deposed, examined the defendant's experts' reports and submitted a new report which again stated that the failure of the knuckle caused the accident.

McEachern's report was filed within thirty (30) days of the defendants' reports. The photograph was also submitted within 30 days. Although the judge allowed an extension of time for Anderson to file his amended report, neither the photo or the reports were discussed by the Court in ruling on the Motion for Summary Judgment. The Court specifically struck McEachern's report.

Even though Plaintiffs' other experts had clearly stated and testified that the accident was caused by the failure of the right rear wheel assembly, after striking McEachern's report, the Court quickly ruled against the plaintiff demeaning the substance of the reports and testimony by those experts.

The District Court refused plaintiff access to the data which caused Mitsubishi to issue Technical Service Bulletins addressing car problems similar to those described by McPhail.

It is an abuse of discretion for a judge to refuse the Plaintiff an opportunity to further investigate and offer rebuttal testimony or address issues raised by the Defendants in their Rule 26 experts' reports. The 11th Circuit affirming the District Court, allows defendants to sit back and not raise issues in products liability cases which they intend to rely on until their experts finally submit their reports well after the plaintiff's experts have made their prima facie reports and then move for summary judgment claiming those issues could not be then addressed by the plaintiff nor was the plaintiff entitled to new discovery. These rulings will effect the outcome of future cases in which expert reports are necessary in the resolution of the issues.

VI

The Federal Rules of Evidence allow use of out of court statements made by a deceased person and by hostile witnesses.

Rule 803(1) FRE provides for admission of a statement made by a declarant explaining an event or condition made while he was perceiving the event or shortly thereafter. Rule 804(a)(3) FRE allows evidence of a deceased persons relevant statements when he is dead. Rule 807 also makes McPhail's statements admissible.

There was evidence the deceased had made statements that there were problems with the car affecting its steering and road handling prior to the wreck, beginning the day he rented the vehicle from Value and he continued complaining about steering and other problems.

Use of testimony of pre-accident problems with a car in proving liability was upheld by the Alabama Court in the case of *Teague v. Adams*, 638 So.2d 836 (Ala. 1994). The court held that type of testimony created a question of fact as to whether the accident was caused by a mechanical problem and was evidence of such weight and quality that fair minded persons in the exercise of impartial judgment could reasonably infer that mechanical problems with the car contributed to or caused the accident.

Since Frankie Young had commenced a suit against Plaintiff which was pending, both he and his wife were fairly treated as hostile witnesses. Since both testified inconsistent with statements they made earlier Rule 801(d)

FRE makes Frankie Young's statements and that of his wife admissible to impeach their testimony as offered by the defendants in support of their Motions For Summary Judgment. Under Rule 703 FRE they are admissible to show the basis on which Experts premised part of their investigation. Under Rule 801(d) FRE statements Mrs. Young made to the Navy Investigator which are part of his official report are proper on substantive issues as well as impeachment. *Rainey v. Beech*, supra. It is reversible error to disregard such testimony.

VII

Where there is a contract, in which warranty or other contractual obligations were made, Federal Courts should apply the law of the state in which the act of negligence occurred, which resulted in an accident, in determining issues of breach of contract or implied warranty of suitability for the purpose for which the car was rented.

One issue in this case involves Common Law negligence. Under Alabama Law, if a defendant rents a defective car to someone, it is liable if that vehicle causes an injury. *Al De Ment Chevrolet Co. v Wilson,* 42 So.2d 585 (Ala. 1949) § 32-5-212 Code of Ala.; *Teague v Adams,* 639 So.2d 836 (Ala 1994); *Economy Fire and Casualty Company v Goar,* 551 So.2d 957 (Ala.1989); *Aircraft Sales and Service v Gant,* 255 Ala. 508, 52 So.2d 388 (Ala 1957).

Since Mitsubishi Motor Sales remained the owner of the car being rented by Value with Mitsubishi Motor Manufacturing doing the maintenance, if there was a defect in the car at the time it was rented, they stand in the same shoes as Value and are liable for any injuries caused by the defect. There are certain defenses that are available. One is knowledge on the part of the plaintiff that he was in actual danger in using the product and another is using the product inconsistent with its intended use. However, there was no testimony to show that McPhail appreciated the danger. He relied upon Value's expertise in furnishing a product for his use. Code of Alabama § 7-2A-213 and § 7-2A-214(5). Plaintiff's experts stated that his driving did not contribute to or cause the accident.

If liability for injuries caused by a defective rental vehicle are in Contract and not in Tort the Alabama Courts would have applied Florida law. *American*

Economy Insurance Co. v Thompson, 643 So.2d 1350 (Ala 1994); Code of Alabama § 7-2A-106. The rule of Lex Loci rather than Lex Loci Delicti normally applies. Alabama's legislature has adopted a substantial contacts rule § 7-2A-106. A negligent breach of contract by renting a defective car occurred at the place of rental rather than the place of the resulting accident.

In Florida a bailor is liable who rents a vehicle whose wheels come off. *Amorosa v Samuel Friedland Family Enterprises*, 604 So.2d 827 (Fla. 1992); Also see *Lee v Hollywood Car and Truck Rental, Inc.*, 485 So.2d 843 (Fla 1985), where the Court applied res ipso locutur where a car burst into flames, but the Plaintiff was unable to determine why it did. In the case of *Moore v Kawasaki Motors Corp. USA*, supra, page 993, the court recognized that any assessment or reconstruction of what caused an accident is necessarily speculative. It allowed experts' testimony based on probabilities rather than certainties and cited *Peters v Calhoun County Commissioners*, supra.

The implied warranties were made in a contract made in Florida and the contract itself was subject to statutory and case laws of that State which govern the validity and effect of short term rental agreements. What the parties bargained for is determined by Florida Law when a car is rented in Florida to a driver driving and licensed in Florida. The mere crossing of a state line did not lower the reasonable expectation of McPhail as set out in *Amorosa v. Friedland*, supra.

Alabama cases now refer to reasonable expectations and application of this substantive law test is proper. *Mueller v. Trambeam Corp*. 693 So.2d 1380 (Ala.Civ.App. 1997); *Economy Fire and Casualty Co. v. Gore*, 551 So.2d 957 (Ala.1989). These cases apply a similar doctrine to Florida's and under Alabama law, the plaintiff is entitled to the reasonable expectation that the wheels of a car rented in Florida will not come loose when it is put to its reasonably foreseeable use, whether suing under negligence, breach of a bailor's responsibility or AMELD. Enforcing reasonable expectations created under a Florida Contract is consistent with Alabama's public policy, *Graham v. Spout Waldron*, 657 So.2d 868 (Ala.1995) and granting summary judgment was not appropriate.

VIII

In deciding tort liability for a wreck in Alabama, caused by a defective rental vehicle, where Federal Courts decide strict liability does not apply, they should address the parameters of Alabama's negligence law in deciding liability.

The Courts seem to accept defendants' argument that AMELD subhumed any Common Law negligence theories. In *Ford Motor Company v Burdeshaw*, 661 So.2d 236 (Ala 1995), the Court clearly stated that parties could proceed on negligence; implied warranty; and products liability. In that case the Court recognized that some parts of vehicles are supposed to last for the life of the vehicle and that their failure to do so is a defect.

If the courts were justified in rejecting Plaintiff's proof under AMELD they should have then looked at common law negligence for renting defective products. A person is liable in tort for renting a defective product in Alabama. *Aircraft Sales and Service v. Gant*, 255 Ala. 508, 52 So.2d 388 (Ala.1951); *Motor Terminal and Transportation v. Millican*, 244 Ala. 39, 12 So.2d 96; *Knowles v. Dark and Boswell*, 211 Ala. 59, 99 So. 312 (Ala.1924); *Saunders System Birmingham v. Adams*, 217 Ala. 621; 117 So.72 (Ala.1928).

The law established by these cases was left in place by the legislature, which, when it adopted warranty statutes relating to rentals, stated in § 7-2A-214(5) that those laws did not expand or limit a lessor's liability for defective consumer goods. The law of negligence in bailment should not have been blindly ignored by the lower courts in determining issues of tort liability in the wreck of a rental vehicle.

In Alabama (and in Federal Courts) a jury, not the judge, is free to accept the Defendants' version of disputed facts re the accident, if the court gives it instructions on all of plaintiff's theories. *Taylor v. General Motors*, supra, citing *Ala. Farm Bureau v. Jericho Plantation*, 481 So.2d 343 (Ala.1985).

CONCLUSION

The critical errors cited in this Petition for Certiorari show that the lower courts gave weight to only one side's version of contested facts and accepted as conclusive claims which juries were free to reject and warrant review by this Court. The lower courts interpreted pleading and evidentiary rules are inconsistent with well established law designed to assure the just disposition of cases brought before the courts.

This case, if followed by other courts, will nullify well defined and developed substantive law and rules of evidence, pleadings and procedure, unless they are reversed by this Court as the Lower Courts radically departed from Alabama substantive and Federal substantive and procedural Law.

The lower court holdings nullify important provisions of an Act of Congress, and threaten the right of response guaranteed to a party bearing the burden of proof by the Seventh Amendment of the Constitution.

The lower courts belittled Plaintiff and her proof and ignored her proof, without giving adequate and plausible reasons for doing so. Given the important nature of the substantive and procedural issues raised, Certiorari should be granted on any or all of the above issues, and the lower courts rulings corrected or affirmed so that other Courts can have clear substantive and procedural precedence and rules on which to rely in future cases.

Respectfully submitted,

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Supreme Court, U.S.
FILED
OCT 14 1998
OFFICE OF THE CLERK

No. 98 635

In the

Supreme Court of the United States

October Term, 1998

FRANCES McPHAIL, as Administratrix of the Estate of David Harry McPHAIL, Deceased,

Petitioner,

vs.

MITSUBISHI MOTOR MANUFACTURING OF AMERICA, INC., MITSUBISHI MOTOR SALES OF AMERICA, INC. and VALUE RENT-A-CAR,

Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

WILLIAM H. SALIBA
Attorney for Petitioner
850 Downtowner Blvd.
Mobile, AL 36609
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91pp

APPENDIX

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APPENDIX A - OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED JULY 16, 1998. Case No. 97-6522

On Appeal from the United States District Court for the Southern District of Alabama

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion_____, 11th Cir. 19__,__F.2d).

Before: HATCHETT, Chief Judge, EDMONDSON, and CARNES, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

J.L. EDMONDSON
UNITED STATES CIRCUIT JUDGE

ORD-42

(6/95)

APPENDIX B. - OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED JULY 16, 1998. Case No. 97-6522

On Appeal from the United States District Court for the Southern District of Alabama

Before: HATCHETT, Chief Judge, EDMONDSON, and CARNES, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing filed by appellant is DENIED.

ENTERED FOR THE COURT:

J.L. EDMONDSON
UNITED STATES CIRCUIT JUDGE ORD-41

APPENDIX C - OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED APRIL 10, 1998, AFFIRMING THE LOWER COURT. Case No. 97-6522

Appeal from the United States District Court
for the Southern District of Alabama

Before HATCHETT, Chief Judge, EDMONDSON, and CARNES, Circuit Judges.

PER CURIAM:

Plaintiff appeals the grant of a motion to strike a report made by an expert and the grant of summary judgment in favor of Defendants on product defect claims. We affirm.

Background

Plaintiff's son, David McPhail ("McPhail"), was killed in a single-car accident involving a 1994 Mitsubishi Galant rented by McPhail. Defendants include the manufacturer, distributor, and lessor of the automobile.

Plaintiff, acting as administratrix of her son's estate, filed suit for his death. She alleged various defects in the automobile. The alleged defects included the design of the passenger compartment, headlights, steering, right rear suspension system, brakes, and driver's side airbag.

Pursuant to Federal Rule of Civil Procedure 26, courts may set schedules for the disclosure of expert reports. In this case the court set such a schedule: it required all expert reports to be filed by 2 January 1997, and all depositions of the experts to be taken by 1 February 1997. (This schedule reflected a previous extension of the deadlines by the district court.) But, Plaintiff filed the report of J. Albert McEachern, which was dated 22 February 1997.

Because of the tardy filing of the McEachern report and because it was not in deposition or affidavit form, the district court granted Defendants'

motion to strike McEachern's report. The district court then granted Defendants' motion for summary judgment. Plaintiff appeals both the striking of McEachern's report and the granting of summary judgment for Defendants.

Discussion

I. Motion to Strike Report

The granting of a motion to strike an affidavit, or similar statements, is reviewed by this court for abuse of discretion. See Hancock v Hobbs, 967 F.2d 462, 468 (11th Cir. 1992).

In this case, the report of McEachern was not in affidavit form or in the form of a deposition — as required by Federal Rule of Civil Procedure 56 for summary judgment motions. See Fed.R.Civ.P. 56(e). Also, the report was submitted untimely. That the report of McEachern was not a sworn affidavit, deposition, or other appropriate form of evidence would have made it improper for the district court to consider. Thus, the district court cannot have abused its discretion by striking the report. See Jones v. Menard, 559 F.2d 1282, 1285 n.5 (5th Cir. 1977)(correct to refuse to consider evidence which is not a proper Rule 56 submission).[1]

II. Motion for Summary Judgment

A motion for summary judgment should be granted where there exists no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. See Tipton v. Bergrohr GMBH-SIEGEN, 965 F.2d 994 (11th Cir. 1992). Summary judgment must be granted where the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case." Celotex Corp. v Catrett, 477 U.S. 317, 322 (1986). The nonmoving party must put forward "more than a mere scintilla of evidence." Combs v. Plantation Patterns, 106 F.3d 1519, 1526 (11th Cir. 1997) (citations omitted).

Because the events involved in this action arose in Alabama and the case was removed to federal court based upon diversity of citizenship of the

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[1] 1.Plaintiff argues that McEachern's unsworn report should be considered "rebuttal" evidence. But, McEachern's report fails to rebut evidence filed with the court about the motion for summary judgment, and the report was still untimely filed.

parties, the law of Alabama applies to Plaintiff's defect claims. See Erie R.R. Co. v Tompkins, 304 U.S. 64 (1938). To establish a prima facie under the Alabama Extended Manufacturers Liability Doctrine ("AEMLD"), the law governing this case, Plaintiff must establish that he suffered injuries or damages due to a product's defective, unreasonably dangerous, condition. See Casrell v Altec Indus., Inc., 335 So.2d 128, 132-33 (Ala. 1976).

About the various defects alleged by Plaintiff, she has failed to establish the existence of design defects — by failing to allege a safer, practical, alterative design — or that the alleged defects were the cause of McPhail's accident or his fatal injuries. See Beech v Outboard Marine Corp., 584 So.2d 447, 450 (Ala. 1991) (requiring the evidence of a feasible alternative to show a design defect); General Motors Corp. v Edwards, 482 So.2d 1176, 1181 (Ala. 1985) (defect must either cause accident or cause injuries to result in liability), overruled on other grounds, Schwartz v. Volvo North America Corp., 554 So.2d 927 (Ala. 1989).

Without the contents of McEachern's report, nothing from which a reasonable juror could conclude defects existed in the 1994 Mitsubishi driven by McPhail was before the court. Plaintiff has failed to establish an element essential to her case.
AFFIRMED.

- - - - - - - - - - - - - - - - - -

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-6522
Non-Argument Calendar

District Court Docket No. CV 96-0119

FRANCES MCPHAIL AS ADMINISTRATRIX OF THE ESTATE OF DAVID HARRY MCPHAIL, DECEASED,
Plaintiff-Appellees.

versus

MITSUBISHI MOTOR SALES OF AMERICA, INC., VALUE RENT-A-CAR, INC., et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Alabama

Before HATCHETT, Chief Judge, EDMONDSON, and CARNES, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District court for the Southern District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT plaintiff-appellant pay to defendant-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: April 10, 1998
For the Court: Thomas K. Kahn, Clerk

By: Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: July 31, 1998

APPENDIX D. - OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA DATED JUNE 2, 1997, STRIKING PLAINTIFF'S EXHIBIT(S). Case No. 96-0119

ORDER

This matter is before the Court on defendants' "motion to strike exhibit one to plaintiff's opposition to motion for summary judgment" (Doc 50). Plaintiff filed a response (Doc. 51) which prompted defendant to file a reply brief (Doc. 55). Thereafter, plaintiff filed a reply to defendants' reply (Doc. 56). Defendants motion to strike is now ripe for ruling.

Exhibit One of plaintiff's response to defendants' motion for summary judgment (Doc. 45 and attachments) is entitled "Engineering Analysis of Automotive Accident." It was prepared by J. Alert McEachern, Jr., P.E., and is dated February 22, 1997. Therein McEachern opines that the "knuckle" of the right rear suspension—one of the alleged defects in this product liability action—broke before the accident in question occurred and that the knuckle should have been designed differently.

Defendants move to strike this exhibit on the ground plaintiff failed to produce this Rule 26 report in accordance with the court's scheduling order. The Order of December 6, 1996, (Doc. 31), which extended previous deadlines, set January 2, 1997 as the last day for plaintiff to file her expert reports. It also set February 1, 1997, as the last day for defendants to take the depositions of those experts. McEachern's Rule 26 Report was not received by defendants until February 26, 1997, six days after they had filed their motion for summary judgment.

The court finds that plaintiff has failed to comply with the court's scheduling order. Plaintiff's non-compliance was considerable and prejudiced defendants. Plaintiff contends that the McEachern report complies with Rule 26(a)(2)(C) as a "rebuttal report". The first sentence of Rule 26(a)(2)(C) reads, in pertinent part: "[t]hese [expert report] discloses shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties. . ." The court has the option of setting its own schedule for the disclosure of expert reports or deferring to the default schedule of Rule 26(a)(2)(C). In this instance, the

court opted for its own scheduling order. Plaintiff has failed to comply with that order.[2]

The court also finds that the McEachern report is not a proper Rule 56(c) submission. The opinions expressed in the McEachern report have not been adopted by McEachern in an affidavit, nor have they been expressed in deposition testimony submitted to the court. Therefore, the McEachern report is inadmissible evidence and will not be considered in deciding the summary judgment motions. *Jones v Menard*, 559 F.2d 1282, 1285 n.5 (5th Cir. 1977).[3] For these reasons, defendants' "motion to strike exhibit one to plaintiff's opposition for motion for summary judgment" (Doc. 50) is due to be, and hereby is, GRANTED.

Also before the court is plaintiff's motion to strike (Doc. 53). Originally, plaintiff asked the court to strike certain defense exhibits used in response to plaintiff's motion for summary judgment on the ground that said exhibits were not timely made available to plaintiff. However, plaintiff has since admitted that these exhibits were timely produced and withdrawn the motion to strike. See Document 56. Plaintiff's withdrawal of its motion to strike (Doc. 53) is NOTED.

DONE this the 2nd day of June, 1997.

Richard W. Vollmer, Jr.
UNITED STATES DISTRICT JUDGE

---

[2] Plaintiff maintains that the Order of March 13, 1997 (Doc. 46) sanctions the McEachern report as a proper submission. This argument is without merit. That Order granted plaintiff's motion for an extension of time to file a rebuttal report by expert Anderson. Nothing in plaintiff's request mentioned McEachern.

[3] In Bonner v City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

APPENDIX E. RULING BY MAGISTRATE DATED FEBRUARY 12, 1997, DENYING PLAINTIFF'S MOTION TO COMPEL. Case No. 96-0119

ORDER

This matter came before this Court for hearing on January 28, 1997, on plaintiff's "Motion to Compel Defendants to More Completely Answer Interrogatories 1, 2, and 3" (Doc. 33) and plaintiff's "Motion to Compel" (Doc. 32) relating to plaintiff's Interrogatory Nos. 4 through 15. These motions had been referred to the undersigned for disposition pursuant to 28 U.S.C. § 636(b)(1)(A), Local Rule 26 and the Court's standing order of general reference. After considering said motions, responses of the Defendants, and arguments of counsel, it is determined that both motions should be DENIED.

Attorney's Certification of Attempt to Resolve Dispute

With respect to both motions, this Court finds that plaintiff's counsel failed to strictly comply with this Court's Local Rule requiring certification of attempts to voluntarily resolve the substance of the motions between counsel for the parties. This Court further finds, however, that there was at least a verbal attempt to address these issues between counsel without success. While both Motions to Compel are defective for not having certified the voluntary attempts, that the failure of certification is not, in and of itself, fatal to these motions.

First Motion to Compel

With respect to the plaintiff's Motion to Compel further responses to Interrogatory Nos. 4 through 15 (Doc. 32), it is determined that the scope of the plaintiff's interrogatories are non-specific, not sufficiently detailed to place the defendants upon notice of the specific information requested, and overly broad. This Court further finds that the information requested is irrelevant to both the plaintiff's allegations regarding the cause of the accident and to plaintiff's decedent's cause of death. Therefore, the plaintiff's Motion to Compel further responses to Interrogatory Nos. 4 through 15 is **DENIED**.

Second Motion to Compel

With respect to plaintiff's Motion to Compel Further Responses to Interrogatories 1, 2, and 3 (Doc. 33) this Court finds as follows:

1. Identities of the persons requested appear to relate only to the identities of persons who have now been identified as experts to be called at the trial of this case by the defendants. Therefore, plaintiff's Motion to Compel is considered moot as to this request. The plaintiff shall receive their reports at the time established in the Rule 16(b) Scheduling Order.

2. With respect to Interrogatory No. 3, the defendants have responded that they are aware of no such person, therefore, that portion of the motion is denied.

DONE and ORDERED this the 12th day of February, 1997.

William E. Cassady

WILLIAM E. CASSADY

UNITED STATE MAGISTRATE

APPENDIX F- JUDGE'S ORDER OF MARCH 3, 1997, AFFIRMING THE MAGISTRATE'S RULING DENYING PLAINTIFF'S MOTION TO COMPEL. Case No. 96-0199

ORDER

Presently before the court is plaintiff's motion (Doc. 43) for an extension of time to file a rebuttal response to defendants' expert reports. Plaintiff's motion is due to be, and hereby is, GRANTED. Plaintiff shall have eleven (11) days from the date of entry of this Order to file the requested rebuttal response.

Also before the court is plaintiff's appeal (Doc. 42) of Magistrate Judge Cassady's Order of February 12, 1997 (Doc. 36) which denied plaintiff's motion to compel (Doc. 32) the defendants to more fully answer Interrogatories four through fifteen. After due and proper consideration, the court hereby AFFIRMS Magistrate Judge Cassady's Order of February 12, 1997 (Doc. 36) which denied plaintiff's motion to compel.

Additionally, plaintiff has filed a motion to amend her motion for summary judgment and a motion to place her summary judgment motion and brief under seal (Doc. 44). Plaintiff's motion to place under seal is hereby GRANTED. The Clerk of Court is INSTRUCTED to place plaintiff's motion for summary judgment and accompanying brief (Docs. 39 and 40) under seal. As for plaintiff's motion to amend the summary judgment brief, said motion is due to be, and hereby is, GRANTED.

DONE this the 13th day of March, 1997.

UNITED STATES DISTRICT JUDGE

APPENDIX G- PLAINTIFF'S MOTION TO COMPEL

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

FRANCES McPHAIL as
Administratrix of the
estate of DAVID HARRY
McPHAIL, deceased,

Plaintiff,

vs CIVIL ACTION 96-0119-RV-C

MITSUBISHI MOTOR
MANUFACTURING OF AMERICA,
INC.; MITSUBISHI MOTOR
SALES OF AMERICA, INC.;
and VALUE RENT A CAR, INC.

Defendants.

MOTION TO COMPEL

COMES NOW the Plaintiff and moves this Honorable Court for an Order compelling the Defendants to respond to the Interrogatories numbers four (4) through fifteen (15) and respectfully shows to this Court as follows:

THE INTERROGATORIES AND ANSWERS

1. A copy of the Defendant Mitsubishi's Answers to the Interrogatories is attached hereto as Exhibit "A" as the answer contains the original questions and the responses made to each. In addition, it also contains an item designated as a Preliminary Statement and Objections on which it and the other Defendants base part of their objections to answering the interrogatories.

THE PLEADINGS

2. The complaint filed by the Plaintiff in January, 1996, contains the following allegations which are relevant to this Motion to Compel.

(A) Count Two alleges that when the brakes were applied the radio would go dead and the lights on the vehicle would go dim making proper operation of the vehicle difficult. It also alleged that the deceased was involved in an accident in which he lost control of the vehicle and left the roadway while operating the vehicle at night on a curve. The Complaint contains an allegation that as a proximate result of the loss of control of the vehicle resulting from the defects in the brake and electrical systems, David Harry McPhail had an accident in which he suffered injuries from which he died.

(B) Count Two alleges that the automobile was defective in that the steering on the automobile malfunctioned and the steering on the vehicle was difficult. It further alleged that not only was steering difficult but that it may have failed causing loss of control and/or sudden acceleration of the vehicle.

(C) Count Four alleges that the brake system of the automobile was so defectively designed, built, or maintained that it failed when the yoke of the car separated or broke. It also contained allegations that as a result of a failure of the braking system, David Harry McPhail was involved in a wreck in which he was killed.

(D) Count Six contained allegations that the right side airbag in the automobile deployed without the driver's side airbag deploying and because it failed to do so it failed to prevent or lessen injuries to David McPhail.

THE DISCOVERY OUTLINE

3. In the Report of Parties Planning Meeting the Plaintiff was required to state it's position setting out a brief statement of the facts and causes of action stated in each count. The Plaintiff set out in that Statement that:

(A) The Plaintiff's complaint defined the automobile as being defective and dangerous by reason of the design defects, manufacturing or part defects, or lack of proper maintenance care or repair.

(B) The vehicle was defective and dangerous in it's construction or design and not crashworthy in that the passenger compartment of the vehicle was not sufficient to prevent the collapse of the passenger compartment, that the side panels were not sufficient to prevent aggravated injuries from a side impact, and that the skin of the doors was not so attached so as to

remain in place if the vehicle flipped.

(C) There was a defect in the design, manufacture, or maintenance in that when the brakes were applied the radio would go dead and the lights on the vehicle would go dim, making proper operation of the vehicle difficult.

(D) There was a defect in the steering of the automobile and that the steering of the vehicle was difficult. It was pointed out that there was a possible loss of control and acceleration of the vehicle at or about the time of the accident.

(E) Count Five pointed out that the braking system of the automobile was defectively designed, built or maintained and failed in its purpose when the yoke of the automobile separated or broke leaving McPhail without any effective brakes. It pointed out that, as a result of this, he was involved in a wreck.

(F) It was pointed out that the car was defective in that the right side airbag deployed in the accident without the driver's side airbag deploying.

(G) Count Seven stated that any number of the first six defects contributed to, or increased the severity, of the accident resulting in the death of David Harry McPhail.

(H) Count Eight charged that the Defendants knew that the automobile was dangerous and not crashworthy and should have reasonably known because of testing or because of their obligation for inspection and maintenance of the vehicle, that the car was not crashworthy.

(I) Count Nine pointed out the requirements and obligations of the Defendant in seeing that the Federal Standards were met and that the car was reasonably fit for use as an automobile.

PLAINTIFF'S REQUESTED DOCUMENTS FOLLOWING THE DISCOVERY PLANNING CONFERENCE

4. Plaintiff requested the case history of the Galant automobile and has received only partial information relating to the check ins and check outs on the automobile.

5. Plaintiff requested and has not received the manufacturers line set tickets and the manufacturers service orders on the vehicle.

6. Plaintiff requested and has not received the rental agreements on the automobile including any notations or complaints referenced in those rental agreements.

7. Plaintiff requested any customer complaints that were made on the automobile and has only received the warranty claim statements which were made by Value to have warranty work performed on three occasions, following what appears to be customer complaints.

8. Plaintiff requested mechanics notes relating to any problems including invoices or repair tickets and has not received those.

9. As part of request number eleven (11), Plaintiff pointed out that it needed with regard to not only this vehicle, but other Mitsubishi's, documents relating to (1) defects or problems with airbags; (2) defects in the electrical systems; (3) and (6) defects or problems in the steering systems; (4) defects or problems with the brakes; (5) defects with regard to the suspension system; (7) defects with regard to any other major components of the automobile; (8) and (9) documents sent to or received from the DOT or any State or Federal Agency, the National Safety Council or any of it's affiliates relating to complaints about Galants. We also made it clear that we needed documents relating to any complaints concerning lights, horns, radios, brakes, sudden acceleration, motor mounts failing, CV joints or steering problems with Galants and product liability claims involving Galants.

DEFENDANT'S INTERROGATORIES TO PLAINTIFF

10. The Defendant has asked in interrogatory #24 if the plaintiff contends that the injuries sustained by Plaintiff's decedent would have been eliminated or reduced by the use of an alternative design of any component part of this 1994 Mitsubishi Galant. If so, it asks that we state specifically the alternative design and how such design is safer than the existing design; how such design is practical; and specifically when such alternative design was available for use by these defendants at the time the car was manufactured.

11. Although this interrogatory sought information which Plaintiff was not obligated to prove to establish a case, we responded to #24.

DEFENDANT'S REQUEST FOR PRODUCTION

12. In Defendant's Request for Production, the Plaintiff was asked to provide documents which support any of the claims that the subject 1994 Mitsubishi Galant was defective and/or unreasonably dangerous.

ADDITIONAL BACKGROUND

13. During the course of discovery certain Technical Service Bulletins had been issued which related to defects in the Mitsubishi Galants which came to the attention of the Defendant which related to problems which had been reported by customers relating to defects in Mitsubishi Galant automobiles were given to Plaintiff. The service bulletins were issued as a result of complaints which had been input relating to automobiles manufactured using the same techniques and parts as were used in the Mitsubishi Galant driven by David Harry McPhail.

SUMMARY OF THE REQUEST

14. Quite simply, the interrogatories being objected to by the Defendants ask the Defendants **to attach to their answers to the interrogatories, or set out in detail, all data and input generated by Defendants, or received from other sources, which form the basis on which the Technical Service Bulletins were issued.**

15. The Technical Service Bulletins in issue are:

(1) TSB-93-26-001 which bulletin pertained to popping noises and defects in the drive shaft of 1994 Mitsubishi Galants.

(2) TSB-95-34-002 related to adjusting the toe control arm, changing the toe adjustment of the graduation value of the rear-wheel alignment. Engineers recognize that this effects the ability to control the automobile.

(3) TSB-96-26-001 relates again to the Burfield joints or outside CV joint and introduces a tool and instructions for replacing the Burfield joints on 1994 Mitsubishi Galants.

(4) TSB-96-26-002 contains additional information concerning front driveshaft repair kits on 1994 Mitsubishi Galants.

(5) TSB-94-54-003 issued in 1994 has to do with headlight dimming during deceleration on 1994 Galant vehicles.

(6) TSB-94-52B-001 relates to replacement of parts in airbags after they have accidently been deployed or deployed in an actual incident. We have received information that part of the repairs done under warranty on the McPhail vehicle required removal of the dashboard of the automobile and disconnection of the supplemental restraint system of the automobile.

(7) TSB-95-35-001 changes certain technical standards and values for hydraulic unit solenoid valves which control the operation of the antilock braking system on the automobile.

(8) TSB-95-92B-001 which was issued in 1995 has to do with connecting of the battery cables relating to the supplemental restraint system. Since the airbag did not deploy, the need for this Technical Service Bulletin is definitely in issue. Plaintiff has furnished Defendant information received from a wreck in Florida in which the brakes failed and the airbag did not deploy.

(9) TSB-95-52B-003 introduces an additional procedure for checking the SRS front impact sensor and to check for cable continuity problems that could affect the operation of the airbag. It is no secret that the airbag failed to deploy in the Galant driven by David Harry McPhail.

(10) Mitsubishi issued Newsletter #95-FN-3500122 on June 30, 1995, relating to 1994 Galants and the ABS warning light on condition. Since the brakes failed during the accident and all of the brake fluid had drained out of the system of the automobile, the brakes are in issue in this case.

(11) TSB-95-35-006 related to 1994 Galants and related to ABS brake troubleshooting.

(12) TSB-95-35-008 has to do with antilock braking system control units.

OTHER DATA

16. It has recently come to our attention that a case was recently settled in Mobile County in which Mitsubishi was required to repurchase an automobile under the Lemon Law because of the tendency of the automobile, and ac

cording to what the mechanic told the plaintiff in that case, numerous Mitsubishi automobiles having acceleration problems of continuing to accelerate when they were not supposed to be doing so. Since the Defendant has attempted to raise the issue of speed, not only are the interrogatories which we have propounded as Interrogatory #4 through 15 possibly relevant to this action, but there is other discovery which might have some bearing on the various aspects of this case.

17. We submit that Plaintiff is entitled to have discovery of the data which was input that caused the issuance of the various Technical Service Bulletins which were issued relating to defects in the automobile which were relatively close to the complaint made by David McPhail and the way that this accident happened.

CONCLUSION

18. We respectfully request that this Court issue an Order compelling the Defendant to answer the Interrogatories #4 through 15.

Respectfully submitted,

WILLIAM H. SALIBA
SALIW-2476
Attorney for Plaintiffs
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(334) 342-0571

CERTIFICATE OF SERVICE

I certify on this the 17th day of January, 1997, I served a copy of the foregoing on D. Alan Thomas, Esquire, Huie, Fernambucq & Stewart, 800 First Alabama Bank Bldg., Birmingham AL 35203; William R. Lancaster, Esquire, Helmsing, Lyons, Sims & Leach, P.C., P.O. Box 2767, Mobile, AL 36652 by placing the same in the United States Mail, properly addressed, with first class postage prepaid.

WILLIAM H. SALIBA

APPENDIX H- DISTRICT COURT JUDGMENT GRANTING DEFENDANTS MOTION FOR SUMMARY JUDGMENT. Case No. 96-0119

ORDER

Presently before the court is defendants' motion for summary judgment (Doc. 37) on all counts. Defendants have submitted a brief (Doc. 38) and evidence in the form of affidavits, expert reports, and deposition excerpts (attachments to Doc. 37) in support of their motion. Plaintiff filed a brief and evidentiary submissions in response to the motion (Doc. 45). Thereafter, defendants submitted a reply brief (Doc. 49) to which plaintiff replied in kind (Doc. 52). Also before the court is plaintiff's motion for partial summary judgment (Doc. 39)[1] with supporting brief (Doc. 40).[2] Thereafter, defendants filed a response (Doc. 48); plaintiff did not file a reply brief. These cross motions for summary judgment motions are now ripe for disposition without oral argument. The court has carefully reviewed the law and considered the arguments of the parties. For the reasons set forth below, plaintiff's motion for summary judgment will be denied and defendants' motion for summary judgment will be granted.

Plaintiff Frances McPhail brought this product liability suit in her capacity as administratrix of the estate of her deceased son, David Harry McPhail (hereinafter "McPhail"). McPhail died from injuries sustained when the rental car he was driving ran off the road, turned over two and one-half times, and struck a pecan tree. McPhail was the sole occupant. The vehicle involved was manufactured and distributed by defendants Mitsubishi Motor Manufacturing of America, Inc. (MMMA) and Mitsubishi Motor Sales of America, Inc. (MMSA), respectively. It was rented to McPhail by defendant Value Rent A Car (VRAC). Plaintiff seeks recovery from all three defendants for McPhail's death on theories of common law negligence, common law wantonness, Alabama Extended Manufacturer's Liability Doctrine (AEMLD),

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[1] The court previously granted plaintiff's "motion to amend motion for summary judgment" (Doc. 44). The amendments merely substitute the correct numerical figures of certain measurements set forth in the brief in support of summary judgment.

[2] Plaintiff's counsel has not complied with Local Rule 8, which requires that any motion for summary judgment be accompanied by proposed findings of fact and conclusions of law. Plaintiff's counsel is advised to heed the Local Rules in future litigation before this court.

and breach of implied warranty of merchantability. There are eleven counts in the Complaint, only six of which articulate specific causes of action. Plaintiff alleges (1) that the passenger compartment of the subject vehicle was not crashworthy (Count One), (2) that the accident was caused by defects in the vehicle's lighting system (Count Two), (3) that the accident was caused by a defective steering mechanism (Count Three), (4) that the accident was caused by a defect in the right rear suspension system (Count Four), (5) that the accident was caused by a defect in the brake system (Count Five), and (6) that McPhail's injuries were enhanced by the failure of the driver's side air bag to deploy during the accident (Count Six).

I. BACKGROUND

The court has subject matter jurisdiction over this action by way of 28 U.S.C. §§ 1332 and 1441. Venue is appropriate in this judicial district. 28 U.S.C. § 1391(a).

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). See also Addickes v S.H. Kress, Inc., 398 U.S. 144 (1970). All evidence must be viewed in the light most favorable to the nonmoving party. Alphin v Sears, Roebuck & Co., 940 F.2d 1497, 1500 (11th Cir. 1991); Langston v ACT, 890 F.2d 380, 383 (11th Cir. 1989). In ruling on a motion for summary judgment, the function of the court is not to "weigh the evidence and determine the truth of the matter but to determine whether there is an issue for trial." Anderson v Liberty Lobby, 477 U.S. 242, 242-43 (1986).

The standard for awarding summary judgment is the same as that for a directed verdict: "the trial judge must grant [the motion] if, under governing law, there can be but one reasonable conclusion as to the verdict." Morosky v Broward County, 80 F.3d 445, 447 (11th Cir. 1996). To avoid an adverse ruling on a motion for summary judgment, "the nonmoving party must provide more than a mere scintilla of evidence." Combs v. Plantation Patterns, No. 95-6922, — F.3d —, 1997 WL 70680 at *4 (11th Cir. Feb. 20, 1997). "[T]here must be a substantial conflict in evidence to support a jury question." Id (quoting Carter v City of Miami, 870 F.2d 578, 581 (11th Cir. 1989)).

II. FINDINGS OF FACT

1. The automotive product liability action arises out of a one-vehicle accident which occurred on March 19, 1994. Alabama Uniform Traffic Accident Report. McPhail was the driver and sole occupant of the vehicle. He died as a result of injuries sustained during the accident.

2. The subject vehicle was a 1994 Mitsubishi Galant which McPhail had rented from defendant VRAC in Jacksonville, Florida. Complaint at 2 (attachment to Doc. 1).

3. The 1994 Galant was designed by non-party Mitsubishi Motors Corporation, manufactured by defendant MMMA, and distributed by defendant MMSA.

4. The accident occurred qt 12:25 a.m. while the Galant was traveling north on Alabama State Road 188 in Mobile county, Alabama. Alabama Uniform Traffic Accident Report.

5. The vehicle left the roadway in a sharp left hand curve, rolled over, and collided with a tree. Id.

6. Plaintiff's accident reconstruction expert, James Anderson, testified at his deposition that at the time the vehicle left the road, it was traveling at approximately 70 mph. Anderson Depo. at 75.

7. As plaintiff's expert Fred Lewter testified, the posted speed limit for the curve was 45 mph. Lewter Depo. at 99.

8. Anderson testified that the vehicle slid sideways, tripped, rolled over two and one-half times, and struck a large pecan tree in an upside-down fashion with the driver's side leading. Anderson Depo. at 115, 120. Expert deposition testimony presented by both plaintiff and defendants shows that the speed at which the vehicle struck the tree was somewhere between 37 mph. and 47 mph.

9. An autopsy later revealed that McPhail had a core blood alcohol level of 0.108%.

10. Inspections of the vehicle after the accident revealed that the right

rear knuckle (part of the subject vehicle's suspension system) was fractured. According to plaintiff's own metallurgical expert, said fracture was a single-event, sheer overload fracture. Lewter Depo. at 139. There was no fatigue or pre-cracking of the knuckle. Id.

11. While plaintiff's experts opine (or, in the case of Anderson, assume) that the fracture of the right rear knuckle occurred as the vehicle left the pavement or shortly before, they have not come forth with evidence sufficient to permit reasonable jurors to conclude that the knuckle was fractured as the vehicle left the pavement or shortly before. Anderson Depo. at 111; Lewter Depo. at 142-43; Posey Depo. at 108; Mims Depo. at 44-45.

12. Plaintiff has not presented evidence of a safer, practical, or cost-effective alternative design for the knuckle. Lewter Depo. at 205-06.

13. The 1994 Galant driven by McPhail was equipped with a driver's front air bag; it did not have side air bags. The driver's front air bag did not deploy during the accident. However, plaintiff and defense are unanimous in their testimony that deployment of the front air bag would not have prevented McPhail's death because the vehicle sustained a side impact. Anderson Depo. at 59-60; Posey Depo. at 58-61; Mims Depo. at 39; Lewter Depo. at 219; Roberts Affidavit.

14. Plaintiff has not produced evidence of any defect in the structure of the occupant compartment — i.e., the body of the vehicle, including the side doors — or evidence that anything about the occupant compartment caused or contributed to the injuries sustained by McPhail. Posey Depo. at 101; Mims Depo. at 65. In addition, contrary to plaintiff's bald assertion, the undisputed evidence shows that the 1994 Mitsubishi Galant complied with all applicable federal side impact standards.]

15. Plaintiff's experts have not testified as to any facts which would support plaintiff's claim that the lights on the Galant dimmed immediately prior to McPhail's accident. Posey Depo. at 77; Mims Depo. at 81-82.

16. Plaintiff's experts have not testified as to any facts which would support plaintiff's claim that there was a problem with the steering of the vehicle prior to the accident. Posey Depo. at 91-92; Mims Depo. at 51-52.

17. Plaintiff's experts have not testified as to any facts which would support plaintiff's claim that the Galant's brakes failed prior to the accident.

Mims Depo. at 79; Posey Depo. at 85.[3]

18. McPhail died as a result of fatal injuries caused by the vehicle's impact with the tree. Roberts Aff. at 2.

II. CONCLUSIONS OF LAW

In this product liability action, plaintiff asserts that the 1994 Mitsubishi Galant driven by decedent McPhail had one or more defects which either caused the accident or enhanced the injuries he sustained in the accident. It is contended, *inter alia*, that the subject vehicle was defective within the meaning of AEMLD. To establish liability under AEMLD, a plaintiff must show:

(1) he suffered injury or damages to himself or his property by one who sells a product in a defective condition unreasonably dangerous to the plaintiff as the ultimate user or consumer, if

(a) the seller engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) showing these elements, the plaintiff has proved a prima facie case although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

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[3] At his deposition, Mims testified that there was no brake fluid in the brake fluid reservoir after the accident. Mims stated that the right rear brake line was severed and that the found brake fluid sprayed all over the right rear wheel assembly. He opined that fluid should have been found in the reservoir after the accident, assuming that the reservoir had been supplied with sufficient brake fluid. On this basis, plaintiff contends that McPhail's brakes failed for lack of brake fluid and that the died as a result thereof. This contention must fail, however, because plaintiff has presented no evidence (expert or otherwise) that McPhail attempted to apply the brakes during the course of the accident. In fact, at his deposition, Mims admitted that he had no evidence of brake application. Mims Depo. at 54-55. Moreover, Mims testified that "I couldn't tell you what the difference [of having brake fluid in the reservoir] would make. . ." Id, at 58. He also had "now way of telling" whether the loss of brake fluid was caused by the fracturing of the knuckle during the accident or some other cause. Id, at 54-55.

(b) the user or consumer has not bought the product from, or entered into any contractual relation with, the seller.

Casrell v Altec Industries, Inc., 335 So.2d 128, 132-33 (Ala. 1976). The term "defect" is considered synonymous with "unreasonably dangerous"; a "defect" is that which renders a product "unreasonably dangerous", i.e., not fit for its intended purpose. Id. at 133. Thus, the Alabama Supreme Court interprets "defective" to mean that the product does not meet the reasonable expectations of an ordinary consumer as to its safety." Id.

"Sellers" of a product are subject to liability under AEMLD. The term "seller" includes manufacturers, suppliers, distributors, and actual sellers of a product. Id. at 132. Lessors of a product, such as VRAC in the instant case, are also deemed "sellers" of the product. See Rhodes v Tractor & Equipment Company, 677 So.2d 194, 195-96 (Ala. 1995). Thus, all three named defendants are subject to liability on plaintiff's AEMLD claim.

"[T]he failure of a product does not presuppose the existence of a defect." Townsend v General Motors Corporation, 642 So.2d 411, 415 (Ala. 1994). A defect in a product must be affirmatively shown. Id. And, where the product at issue — like the automobile in this case — and its alleged defects are of a "complex and technical nature," expert testimony is required to prove the existence of a defect; without expert testimony, a lay jury could not reasonably infer that a defective condition was the cause of the vehicle's failure and the cause of the resultant injury. Brooks v Colonial Chevrolet-Buick, Inc., 579 So.2d 1328, 1332-33 (Ala. 1991).[4] Furthermore, the doctrine of *res ipsa loquitur* is not applicable in a product liability action. Id. at 1333. In this case, plaintiff has, without using the actual phrase, attempted to advance her cause with this doctrine. To the extent that plaintiff has sought to avoid summary judgment by reference to *res ipsa loquitur*, the court has not considered such arguments as they are without merit.

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[4] It should be noted that two of the plaintiff's experts testified that they intended to express an opinion at trial only as to certain of the alleged defects. Plaintiff's metallurgical expert, Fred Lewter, testified that the only opinions he intended to offer at trial relate to the air bag and knuckle. Lewter Depo. at 96-97. Plaintiff's accident reconstruction expert, James Anderson, testified that his area of concentration is accident reconstruction and that his opinion of defectiveness is limited to the knuckle. Anderson Depo. at 126-27.

In addition to AEMLD, plaintiff seeks recovery on theories of negligence and wantonness. These two common law claims have been subsumed by the AEMLD. Veal v Teleflex, Inc., 586 So.2d 188 (Ala. 1991). Accordingly, in consideration the motions for summary judgment, the court considers these two claims as part and parcel of the AEMLD claim.

A. The Alleged Defects

Plaintiff has attempted to show that manufacturing and/or design defects[5] existed with respect to the Galant's passenger compartment, headlights, steering, right rear suspension system, brakes, and driver's air bag. As discussed below, plaintiff has failed to produce evidence that any of these systems were defective.

1. Suspension System

Plaintiff's primary allegation is that the component of the right rear suspension — specifically, the "knuckle" — was defective by manufacture such that it fractured while the vehicle was traveling along the roadway, thereby causing a loss of control and McPhail's subsequent death. Anderson Depo. at 111. Plaintiff's metallurgical expert, Fred Lewter, concedes that the fracture was a single-event, sheer overload fracture which would require the application of significant force. Lewter Depo. at 129, 189. However, plaintiff's experts admittedly have **no explanation** as to what mechanism could have caused the fracture **prior to the vehicle leaving the road**. Id. Plaintiff's experts admit that there was no fatigue or pre-cracking in the knuckle. In short, plaintiff's experts have not testified as to any facts which would support plaintiff's claim that there was a problem with the Galant's knuckle immediately before it left the roadway. Plaintiff's allegation is that some unknown force (of about 30,000-40,000 lbs.) was exerted on the right rear sus

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[5] Throughout this litigation, plaintiff has been very unclear as to whether she is claiming defectiveness by manufacture, by design, or both. Considering plaintiff's claims in the light most favorable to her, the court construes the complaint as alleging defectiveness in both manufacture and design with regard to the suspension system claim. The other claims are intelligible solely on the purported existence of a manufacturing defect because plaintiff has alleged that the other systems suffered defects unique to this particular vehicle and because plaintiff has never alleged, as would be required for a finding of defective design, that better and safer alternative designs existed for these other systems.

pension system from the side just as the Galant entered the curve.[6] Without evidence to support this allegation, plaintiff cannot survive summary judgment on this claim.

Plaintiff also contends that the knuckle was defective by design; however, she has not identified any superior alternative designs for the knuckle which could have been used in the 1994 Galant. In order to recover in an AEMLD action on an allegation of a design defect, a plaintiff must prove that a safer, practical, alternative design was available to the manufacturer at the time it manufactured the automobile. The existence of a safer, practical, alternative design must be proved by showing that:

(a) The plaintiff's injuries would have been eliminated or in some way reduced by the use of an alternative design; and that,

(b) Taking into consideration such factors as intended use of the vehicle, its style, cost, and desirability, its safety aspects, the foreseeability of the particular accident, the likelihood of the injury if that accident occurred, the obviousness of the defect, and the manufacturer's ability to eliminate the defect, the utility of the alternative design outweighs the utility of the design actually used.

Beech v. Outboard Marine Corporation, 584 So.2d 447, 450 (Ala. 1991) (emphasis added) (citing Edwards v General Motors Corporation, 482 So.2d 1176, 1191 (Ala. 1985).

Courts have strictly construed the requirement that the plaintiff in an AEMLD action show the existence of an alternative design that is both "practical" and "safer". In Elliot, the Eleventh Circuit reversed an AEMLD verdict against a manufacturer of a boat motor, the alleged design defect being a lack of a guard around the motor's propeller. Elliot, 903 F.2d at 1506. The Eleventh Circuit held that plaintiff has failed to demonstrate that his proposed alternative design was practical, as required by Alabama law. Id. at 1507. The plaintiff in that case did show the jury a working alternative design actually being used on the subject boat — a ring guard that attached to the motor's

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[6] In contract, defendants' metallurgical expert, Herman Gilmore, states that the fracture occurred between the vehicle's first roll and its impact with the tree. Gilmore Rule 26 Report. Gilmore unequivocally states that there was not enough force generated by the car prior to leaving the road to cause the fracture. Id.

propeller and reduced boat speed by only five miles per hour. Id. at 1509. The Court noted that even though plaintiff demonstrated a working model of this prototype actually being used on the subject product, plaintiff failed to demonstrate the existence of a practical design. Id. the Court stated that the plaintiff's demonstration showed only that it was possible to equip the motor with an alternative design, not that the design was "practical". Id.

The strict nature of this standard also is shown in Beech v Outboard Marine Corp., 584 So.2d 447 (Ala. 1991), another propeller guard case. In Beech, the Alabama Supreme Court followed the reasoning of Elliot and held that plaintiff failed to demonstrate that a reasonably feasible practical alternative existed at the time of manufacture. The Court stated that it "decline[d] to hold, as a matter of law, that simply because a 'feasible propeller guard could have been designed by a proper use of the manufacturer's resources' that an 'alternative design' existed." Id. at 450.

In the present case, plaintiff's metallurgical expert, Fred Lewter, testified as follows:

Q: You're critical of what my client did in this case, and you say something else should have been done, but you haven't done it and you don't have the alternative, right?

A: It's not my job to get the alternative to tell your client how to design their part.

Lewter Depo. at 205. While Lewter himself may not have been charged with the responsibility of designing and testing an alternative design, plaintiff is shouldered with such a burden — a burden which she has failed to meet.

Plaintiff contends, by way of the expert testimony of Lewter, that the cast iron knuckle should have been made out of steel. Lewter Depo. at 205. However, he further testified that he did not know whether steel knuckle design would be practical:

Q: You can't tell me what kind of steel, you can't tell me the shape you would have used?

A: No.

Q: And can you tell me, to a reasonable degree of engineering certainty, that the same thing would not have happened?

A: I could probably — I could tell you several steels, under several treatments, in the same design, that it would not have been possible to have

happened. Let's don't get into exotic heat treatment here.

Q: Because it wouldn't be practical, would it?

A. Sometime it would, sometimes it wouldn't.

Lewter Depo at 206 (emphasis added). Clearly plaintiff's own expert concedes that he does not have a specific alternative design for the knuckle, and that he has not satisfied the "practical" requirement of Elliot and Beech. Indeed, plaintiff, through her experts, has not attempted to produce an alternative knuckle design. Because plaintiff has failed to show that there is a specific, safer, practical alternative design for the knuckle, summary judgment in favor of defendants is proper on plaintiff's claim that there was a design defect in the Galant's suspension system.

2. Air Bag

Plaintiff contends that there was a manufacturing defect in the air bag system which prevented the driver's air bag from deploying during the accident and, therefore, that defendants are liable for McPhail's death. Both plaintiff and defense experts agree that the deployment of the driver's air bag would not have prevented McPhail's death. It is undisputed that the air bags in the 1994 Galant were designed to offer protection in frontal impacts and not in side impacts. Posey Depo. at 59. As plaintiff's expert Anderson testified:

A: ...the airbag—failure of the air bag to deploy did not prevent him from being-would not have prevented him—Had the air bag deployed, he would have still been killed.

Q. And with the impact to the driver's door, an air bag in front of this occupant is not going to do any good?

A: Correct.

Anderson Depo. at 58-60. Plaintiff's expert Owen Posey testified:

Q: ...The impact with the tree that resulted in Mr. McPhail's death was the side impact?

A: Yes, sir.

Q: You don't intent to give any opinion that had the driver's side air bag deployed, that it would have done Mr. McPhail a bit of good, do you?

A: No sir. It may have, I don't know, but the impact was severe, and I don't know whether if would have helped him or not.

Q: But you don't intend to give an opinion to that effect, right?

A: No, sir.

Q: Okay. That's not your field?

Posey Depo. at 58. See also Mims Depo. at 39; Lewter Depo. at 219.

In General Motors Corp. V Edwards, 482 So.2d 1176 (1985), the Supreme Court of Alabama directly addressed the "crashworthiness" or second-collision doctrine, which is applicable to plaintiff air bag claim. In sum, the Court held that:

a cause of action does exist against an automobile manufacturer where it is alleged that an automobile manufactured by it was defective, and was involved in an accident, and that the defect, although not causing the accident to occur, contributed to the injuries sustained there.

482 So.2d at 1191. Without question, experts for both sides agree that the non-deployment of the driver's air bag did not contribute to the injuries sustain by McPhail. Thus, plaintiff's air bag crashworthiness claim fails in light Edwards and defendant are entitled to summary judgment as to the air bag claim.

3. Passenger Compartment

Plaintiff has moved for summary judgment on the passenger compartment defect allegation (Count One) [7] See Documents 39 and 40. Plaintiff alleges that the 1994 Mitsubishi Galant does not meet federal side impact standards, specifically those set forth in Federal Motor Vehicle Safety Standard No. 214, and, that this constitutes negligence *per se*, entitling plaintiff to summary judgment on Count One. For all of the reasons thoroughly set forth in "defendants' memorandum brief in opposition, to plaintiff's motion for summary judgment" and the attached documentation (Doc. 48), the court finds plaintiff's contention wholly without merit. The undisputed evidence shows that the 1994 Mitsubishi Galant meets the federal side impact standards set forth in FMVSS 214. Accordingly, plaintiff's motion for summary judgment (Doc 39) is due to be, and hereby is, DENIED.

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[7] Plaintiff has also moved for summary judgment on Count Seven. Count Seven reads, in its entirety: "Plaintiff alleges that the death of David Harry McPhail was the direct and proximate result of a combination of two or more of the defects hereinabove described." Since Count Seven is not a substantive count, plaintiff has effectively moved for summary judgment only as to Count One.

The court will now discuss defendants' motion for summary judgment as it relates to the passenger compartment of the 1994 Galant. Plaintiff maintains that the vehicle was defective because "the passenger compartment was not sufficient to prevent collapse." Complaint at 2. Plaintiff has alleged, at various times throughout his litigation, that the 1994 Galant did not meet federal side impact standards ant that a weld on the driver's door of the subject vehicle was inadequate. Plaintiff's experts, on the other hand, admit that nothing regarding the integrity of the passenger compartment played any role in either the accident or McPhail's death. Expert Posey, plaintiff's only expert who testified on this subject, stated:

Q: ...you can't sit here today, without doing any analysis, without doing any calculations, testing or anything else, (and) state scientifically that had there been some difference in the welding of this side-door beam to the door structure, that it would not have separated in this accident or that it would have changed in any way the injuries sustained by Mr. McPhail?

A: No, sir.

Plaintiff has presented no evidence, expert or otherwise, to support her claim that the passenger compartment of the subject vehicle was defective. Accordingly, defendants are entitled to summary judgment on Count One. See Brooks V Colonial Chevrolet-Buick, Inc., 579 So.2d 1328, 1332-22 (Ala. 1991).

4. Lighting System

Plaintiff alleges in her complaint (Count Two) that when the brakes on the subject vehicle were applied the lights would dim and that this caused the accident. Complaint at 3. However, plaintiff's experts admit that they have no evidence to substantiate such a claim:

Q: ...you don't have any information, based on your analysis and investigation, that there was any problem existing with this car the night of this accident, or that there was even a brake application that would have caused this, right?

A: Correct.

Q: So, there is no way, even if you had that information, that you could say that it had any relevance to this accident, right?

A: Correct.

Mims Depo. at 81-82. Posey could not find any evidence of dimming of lights, either:

Q: ...You don't have any evidence that there was any dimming of the lights on Mr. McPhail's vehicle at the time of this accident, do you?

A: No, sir.

Q: Matter of fact, your opinion is that the sole cause of this (accident) was the knuckle fracture right?

A: That's correct.

Posey Depo. at 77.

Each of the plaintiff's experts who testified on the subject conceded that there was no evidence of any dimming of the headlights on the subject vehicle immediately prior to the accident made the basis of this suit. Thus without any factual basis or expert testimony as to the alleged defect, summary judgment is appropriate on this count as well.

5. Steering Mechanism

Plaintiff also alleges that the "steering" on the subject vehicle was defective. However, plaintiff's experts conceded that they had no information or opinions regarding this allegation:

Q: You found no evidence that you could determine the existence of a problem in the steering prior to the accident?

A: As I stated a while ago, I found the steering column had separated. Whether it occurred before the accident or after the accident, I cannot specifically state that...

Q: ...were you able to determine any information in (the steering column) that told you that it was in that condition prior to wrapping itself around this tree?

A: No, sir.

Posey Depo. at 91-92. Mims, another one of plaintiff's experts, testified that he did not find any problems with the Galant's steering mechanism:

Q: ...And you have looked at the steering system in this vehicle?

A: Correct.

Q: And you found no problems with it?

A: To the best of my knowledge.

Mims Depo. at 51-52.

Plaintiff's own experts have no proof of an alleged defect in the steering system on the 1994 Galant. Accordingly, summary judgment for defendants is proper on the steering defect claim

6. Brake System

Finally, plaintiff alleges that the brake system failed, causing McPhail's accident. Complaint at 4. Again, plaintiff's own experts have testified that they have no proof of any alleged brake failure.

Q: Do you have any evidence that there was any problem with the antilock brake system?

A: No, no not to my knowledge.

Q: Your don't's even have any evidence that there was any braking attempted by Mr. McPhail the night of the accident, do you?

A: No, sir.

Mims Depo. at 70. See also supra note 4 and accompanying text; Posey Depo. at 85. Thus summary judgment in favor of defendants will be granted as to the brake allegation.

B: Other matters

1. Breach of Implied warranty

In count Nine of her complaint, plaintiff contends that these six alleged defects also amount to breaches of the implied warranty of merchantability.[8] In Geohagan v General Motors Corporation, 279 So.2d 436 (1973), the Supreme Court of Alabama held that "no contractual cause of action for wrongful death is created by our Uniform Commercial Code arising from a breach of warranty, ant that actions for wrongful death can arise int this state and be processes only under our wrongful death acts." Plaintiff is suing for the

---

[8] Defendants contend that the standards applied to an implied warranty of merchantability claim is identical to that of the AEMLD and, therefore, that they are entitled to summary judgment on the merchantability claim because plaintiff cannot make out a case under the AEMLD. Ex Parte Morrison's Cafeteria of Montgomery, Inc., 431 So.2d 975, 978 (Ala 1983), is cited for this proposition. The holding in Ex Parte Morrison's that the standard in an implied warranty of merchantability claim is identical to that of an AEMLD claim is specifically limited to cases relating to food. Therefore, this argument is without merit.

wrongful death of her son. Under the rule of Geohagan plaintiff has not cause of action for breach of the implied warranty of merchantability. Accordingly, summary judgment in favor of defendants is due on Count Nine of the complaint.

2. Injunctive Relief

In Count Eleven of the complaint, plaintiff request an injunction regarding the storage and testing of the subject vehicle, the 1994 Mitsubishi Galant driven by McPhail. Plaintiff has not pursued this relief since the filing of the "joint motion and stipulation for testing of the subject vehicle")Doc. 25); and, neither party has addressed County Eleven in their briefing of the summary judgment motions. Because the parties themselves have resolved the concerns raised in County Eleven and because plaintiff has not pursed her request for injunctive relief, summary judgment in favor of the defendants and against plaintiff is due on Count Eleven of the complaint.

IV. CONCLUSION

For the foregoing reason, plaintiff's motion for partial summary judgment (Doc 39) is hereby DENIED, and defendants' motion for summary judgment (Doc 37) is hereby GRANTED. Judgment for defendants on all counts of the complaint will be entered by separate order.

Done this 2 day of June, 1997.

Richard W. Vollmer
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

FRANCES McPHAIL as Administratrix of the Estate of DAVID HARRY McPHAIL, deceased,

Plaintiff,

CIVIL ACTION NO.

vs

96-0119-RV-C

MITSUBISHI MOTOR MANUFACTURING OF AMERICA, INC., MITSUBISHI MOTOR SALES OF AMERICA, INC., and VALUE RENT-A-CAR, INC.,

Defendant(s).

JUDGMENT

FINAL JUDGMENT is hereby entered in favor of defendants Mitsubishi Motor Manufacturing of America, Inc., Mitsubishi Motor Sales of America, Inc., and Value Rent A Car, Inc. and against plaintiff Frances McPhail, as Administratrix of the Estate of David Harry McPhail, deceased, on all counts of the complaint.

DONE this the 2nd day of June, 1997.

Richard W. Vollmer
UNITED STATES DISTRICT JUDGE

JUDGMENT ENTERED US DISTRICT COURT
ON DOCKET S O U .
DIST. AL.
Date: 6-4-97 4TH DAY OF JUNE, 1997
Deborah S. Hunt, Clerk JUDGE-
MENT ENTRY
NO. 6031

APPENDIX I - EXTRACTS FROM DISTRICT COURT DOCUMENT 45 Case No. 96-0119

J. Albert McEachern: Ex. 1-5
* * *

CONCLUSIONS

1. The nodular iron knuckle suspension member appears to have been fractured well before the accident. This conclusion is based on the dirt film found on the fracture surface, the direction and type of fracture, and other observations. Due to the design of the suspension system, the vehicle could have been operated for some time with this unit fractured. This suspension is somewhat redundant in that it has four members attached to the knuckle assembly. With the upper control arm not attached as would be the case with the broken knuckle arm, the shock absorber would support the vehicle as it was designed to, but also maintain the tire and wheel in approximately the right position under straight line driving conditions. The rubber bushing attachment of the shock, however, is not sufficiently strong or stable to maintain the camber of the wheel when a heavy lateral load was applied as would occur in a hard left hand turn. This accident occurred when the vehicle entered a left hand turn at a high speed.

2. The design of the rear suspension for this vehicle appears to have been a major factor in the accident. Some of the literature reviewed indicates that the material of the fractured knuckle was changed at some point in the production process. The use of cast iron for a suspension member of this type is at best a questionable design practice. Since this component is peculiar in that it has a very long, slender member, any material that does not have a high percentage of elongation would be suspect in this application. Although nodular iron is much better in elongation than grey iron, both materials are very brittle relative to steel components. Good automotive design practice would avoid long slender members in suspension systems to minimize defection. This system has a unique long slender member fabricated of cast nodular iron which obviously failed and resulted in the accident.

3. As the vehicle entered the turn, the right rear tire was out of place, most likely turned partially under the vehicle. This resulted in a dramatic and sudden oversteer condition which inevitably resulted in the vehicle leaving the

road, and the resulting rollover. The majority of the damage to the vehicle occurred when it came in contact with the tree.

J. Anderson: Ex. 2
* * *

C. Opinions
1. Mr. McPhail left the road as the road began to curve to his left.
2. The critical speed of the curve was not an issue contributing to this accident.
3. Mr. McPhail was traveling at approximately 60-70 miles per hour, most probably 66 mph, when the suspension failed and he lost control.
3. The vehicle was traveling at approximately 45-50 miles per hour when it struck the tree.
4. The time from the vehicle leaving the road to impact was about 2.385 seconds.
5. The rear suspension failure was the sole proximate cause of the car losing control and impacting with the tree which caused the death of Mr. McPhail.
6. Mr. McPhail had no opportunity to avoid the wreck after the suspension failed.

Anderson Dep. Ex 3

Ex. 3-11
* * * Q: Information exchange; do you know what information was exchanged?

A: Well, one of the things that we were developing as we went was how Fred was saying this thing broke and where he was saying that it broke. And the reason we were trying to nail that — get that kind of information down was because if it was other than what was coming out of the calculations and analysis that was being done in the reconstruction, then there would be an anomaly that I could not explain when I was going to testify, either here or in court, about what I did.

Ex. 3-12
* * * Q: (BY MR. THOMAS:) Tell me your understanding of what the theories were in this case when you were hired.

A: Oh, okay. That a part on the support system of the right rear wheel of the Mitsubishi car broke off and that the vehicle went off the road and rolled into a tree. And the general theory was that the cause of the accident was the breaking of the support system to the right rear * * *

Ex. 3-15

* * * Q: All right.

A: And as a result, I believe the wheel had folded and was not in contact with the ground prior to that point. And there wasn't anything that I could determine, or my associate, from the photographs or that my associate determined at the site, that would have been a reason for that wheel to break between where we believe he left the road and where it's recorded he had the skid marks.

So there wasn't anything that was going on in that space that would have caused the break. So for me, I don't know what caused the break, but I do believe that based on the evidence that I had, that the break occurred before it got to * * *

Ex. 3-17

* * * Q: Did you do a critical-speed analysis?

A Yeah, we did.

Q Okay.

A And that stuff is attached, as you requested. The critical speed of the curve was — A hundred and two was the critical speed.

Q So in your opinion, an automobile under optimal conditions, with the driver knowing the roadway and assuming that you had an automobile that had good tires, proper working order and all that —

A Sure.

Q — the maximum that curve could be driven, in your opinion, was a hundred and two miles an hour?

A Yes.

Ex. 3-18

* * *Q It would not?

A No, no, because what you're dealing with is, you've got a compound curve. You don't have a sudden curve, you have a compound curve; you've got a shallow curve and then a steep curve. The problems you get into with blood alcohol contents are reaction time, but we have a situation here where he is forewarned of the curve because of the shallow curve starting.

So I don't think it would have affected his ability to go through at sev

enty. It certainly would have affected it at a hundred, because he's traveling at a hundred and fifty feet per second at that point

Q Let's just make sure that I understand you. It is James Anderson's opinion that being legally intoxicated,

PAGE 68— NO EXHIBIT NO.

have a blood alcohol level of over .1, would not have affected Mr. McPhail's ability to negotiate this curve at the speed he was traveling, in your opinion?

BY MR. SALIBA: I'm gong to have to object to the form of the question; also on the premise that you're basing it on, since you have received Dr. Barnhill's analysis as far as the Navy report that was furnished you, it says peripheral blood reading is more accurate, .75. so your premise is not there, and I'm going to object to the continuation of this line of question.

Q (BY MR. THOMAS) Can you answer my question, sir?

A I would think that if someone was legally intoxicated, that they would have difficulty negotiating the steepest part of the curve, but not in the area where this accident happened, because it's so much shallower, as my drawing shows.

PAGE 70 OF DEPOSITION — NO EXHIBIT NUMBER

Q Are you critical of him for entering this curve and driving this roadway at least fifteen miles an hour in excess of the speed limit?

A It was a maximum of fifteen miles in excess of the speed limit, and my judgment of him would not be — doesn't have anything to do with my accident reconstruction. I can say personally that I wouldn't have done it, and that's because of all the damage I see from car wrecks.

Q Are you critical of Mr. McPhail for being in this curve at that speed under the influence of alcohol?

BY MR. SALIBA: Object to the form of the question.

THE WITNESS: Jeez, I didn't — My opinion on that, I don't think is relevant, but I'll tell you I wouldn't have done it. But that's really a personal opinion and it's based on what I see as a result.

Ex. 3-20

* * *

Q This is what he told you on January the 3rd?

A Yeah.

Q Have you been told that he testified differently yesterday in his deposition?

A Sure have. But I'm telling you the truth, that's what he told me. I said, well, if you're going to say it broke front to rear, then you better have the

confidence of a Christian holding four aces in a card game in order to testify to it, because there's a lot involved, and I'm assuming you did all the metallurgy on it. But if you said it broke — If you're saying it broke from front to rear, then that's important to me, because I know — I saw the vehicle photographs and the thing's folded up like a conveyor airplane wheels folded up under it.

Ex. 3-22

* * * Q * * * is your opinion based, as I think you've told me, on the assumption that the reason it left the road was because there was a fracture of the right rear knuckle?

A The latter. I make the assumption that there was a fracture that caused a failure in the right rear suspension system. Dynamically, that is — Only thing I can say would be, if that occurred, this dynamic would be compatible with the results of the accident. But I'm not going to testify that it did break, I'm saying that if, in fact, it did, then the accident is consistent with that.

Ex. 3-23

A * * * else to point to why he would have left the road, and I look for all other reasons why he would have left the road in that form. In other words, it wasn't a run-off, he actually went off at an angle. And that angular leaving of the road, at that point on the road, is not consistent with somebody just missing the groove.

So I don't know if I've answered your question, but I'm not going to say that it broke, I'm gong to say that if it broke, it's consistent, it's consistent with the skid marks. And I know of no other reason why it would have left the road, because I have no other physical evidence as to why it would have left the road, or testimony evidence.

Ex. 3-24

* * * Q Tell me what you did.

A I did this; I said, okay, we've got — the skid marks are here, the impact point is here, the vehicle had to leave the road somewhere in here, and I've got two hundred and eighty feet. Where they got the two hundred and four feet is not consistent with the impact from the center of mass of travel for the radius of the curve.

Ex. 3-25

* * * Q (BY MR. THOMAS) Now, what you're looking at here is, you're saying that under your analysis the failure of the steering knuckle has to occur

between 354.86 feet from the tree and then fifty more feet backwards from that, that would get you to 404.86 feet?

A Right, three hundred and fifty to four hundred feet is where the failure would have to have to occurred for this all to happen.

Ex. 3-26

* * * Q Would you anticipate this vehicle sliding sideways, the leading tire not in contact with the ground?

A Right.

Q Isn't that your opinion?

A Yes.

Q It would not be in contact either with the rubber or the side of the wheel or anything, right?

A Right.

Q Or you would have seen some evidence of that, correct?

A Should have seen evidence. It may have been bouncing along and nobody saw that evidence, I don't know. There was none reported.

Q Wouldn't there have been — as the vehicle is traveling, you know, in that orientation, wouldn't there have been

Ex. 3-27

body lean such that it would try to push that right rear portion down toward the ground?

A No. You would think that; that's always your first analysis and it's always my first analysis as well. The situation is that the tire marks that were recorded indicate that the nose of the vehicle was ahead of the rear of the vehicle and the yaw was less than ninety degrees as it crossed. And that angle is represented on what you have marked as Anderson 8. That orientation is such that because the vehicle has a higher weight distribution to the front of the vehicle than to the rear, that it's gong to stay up longer.

And then, as is it plows — as it goes across, it begins to rotate and gets sideways, and at that point, now you've got a different set of forces working. That's when it starts to roll and rolls in.

Ex. 3-28

Q What was the initiation of the trip?

A Just got — The rotation got around enough to where the force from the front right tire was exceeded by the force in the center of gravity, causing the linear momentum to be translated into rotational momentum.

Q Where do you believe that it initially tripped, that being where the left driver's side wheel would have come off the ground?

A About sixty feet back.

Ex. 3-30

* * * Q Did you do photogrammetry?

A No, I took the measurements. That was done more simplistically. That was done by taking the measurements that he provided me for the skid marks and a template of the vehicle wheelspread and wheelbase and positioning on those marks. That was the way it was done, manually, physically taking a clear and seeing how those marks could have been generated.

Ex. 3-46

A * * *lost control and you can scratch out once the knuckle broke and once he lost control there was nothing he could do, it was all over very rapidly.

J. Anderson Amended Expert Report: Ex. 4-2

* * *

C. Opinions

1. Mr. McPhail left the road as the road began to curve to his left.

2. The critical speed of the curve was not an issue contributing to this accident.

3. Mr. McPhail was traveling at approximately 60-70 miles per hour, most probably 70 mph, when the suspension failed and he lost control.

4. The vehicle was traveling at approximately 45-50 miles per hour when it struck the tree. Most probably 47 mph.

5. The time from the vehicle leaving the road to impact was about 3.1 seconds.

6. Alternatively, if the defense expert's, Mr. Cromack, data concerning tree impact speed of 36.6 mph is valid, then;

a. Mr. McPhail's speed when the suspension failed and he left the road was approximately 60.6 mph.

b. The time from the vehicle leaving the road to impact with the tree was about 3.672 seconds.

7. In his report, Mr. Cromack provided no basis for his opinions as to tree impact speed, pre-event speed, or distance traveled from road edge to impact.

8. The rear suspension failure was the sole proximate cause of the car losing control and impacting with the tree which caused the death of Mr. McPhail.

9. Mr. McPhail had no opportunity to avoid the wreck after the suspension failed.

10. The photograph of the skid marks provided by Defense conclusively shows the right rear wheel was not fully connected to the vehicle when the marks were made.

D. Anticipated Exhibits as of March 4, 1997, - Subject to change and additions.

a. Video animation of the wreck, three views

b. Diagrams of site for the purpose of illustrating the path of travel and distances

c. The photograph of the skid marks provided by the defense, March 3, 1997.

Fred Lewter's Deposition Ex 5:

Ex. 5- 5

Q My question, though, is: The exemplar part that you obtained from Mississippi or whatever, you tested it, you etched it, took a look at it under the microscope — or, actually, Bill Faircloth did?

A. Did it for me at that time, yes he did.

Q And the microstructure analysis was consistent with the part that came off McPhail's vehicle?

A That is correct.

Q Okay. And does that surprise you at all?

A It doesn't surprise me at all. It's cast iron.

Ex 5-7

*** Q Now let me back up a second Mr. Letter. You were able to determine at the time of the first inspection, when you were looking at the particular part, that it was fractured all the way through?

A That is correct.

Q Which told you, as a metallurgist and engineer, that this was a single-event overload fracture?

A If appeared to be, yes.

Ex. 5-13

*** Q I have looked at your report as well as Mr. Anderson's report, everybody is consistent that Mr. McPhail was travelling in excess of fifty-five miles

per hour at the time he entered this curve; is that correct?

A That is correct and I have done the same thing.

Ex. 5-14

*** Q He had his foot on the accelerator?

A Accelerating his speed to hold it, just as centrifugal force will hold it. Now what speed he was doing up until the time the knuckle broke, I do not know.

Ex. 5-15

*** Q So he is already out of control and trying to regain control by using the accelerator at the time the knuckle broke?

A After the knuckle broke he had no braking.

Q Well that's not what I asked you.

A He would try to accelerate, especially the way that we do know from what marks we were able to find, that at one time he became perpendicular, with his front end perpendicular to the highway, and he would be powering, trying to get back up on the highway.

Ex. 5-16

*** Q He goes sideways, he's decelerating some amount, is it your opinion that you intend to give to this jury in this case that then this car speeds up?

A It's my opinion that once he got into the slide, he powered, tried to apply power to the vehicle.

Q You say the knuckle fractures, he starts sliding sideways, he then stomps the gas pedal?

A Tried to, yes.

Q What evidence do you have of that?

A It's just the simple physics of the accident. ***

Ex. 5-18

Q Are any of those photographs ones that you used to come up with the opinion that the vehicle was in a counterclockwise yaw slide at the time that the fracture occurs to the knuckle?

A I don't believe that the thing was in a counterclockwise yaw at all prior to the failure of the knuckle. I feel strongly that the knuckle failed resulting in the accident, putting the vehicle into a three wheeled vehicle that should have been a four wheel vehicle and out of total control.

Q See if we can go back to our common frame of reference. This vehicle is entering the curve at something between sixty and seventy miles an hour, everything is in tact including the knuckle, correct?

A Going into the curve, I cannot say, as I said, what the speed was prior to the time that the knuckle failed.

Ex. 5-19

Q You can't say it was doing sixty or seventy?

A Only from the mathematics of working it on the curve and everything else and the center of gravity, because I feel strongly that the knuckle failed and the vehicle went off the road at that time, was definitely not in a slide, but started sliding and going into a side slide, crossed into the situation and flipped—

Q Okay.

A — several time and wound up in the tree.

Q Going back to the speed, you say that the yaw did not occur until the knuckle fractured?

A I feel strongly that the fracture of the knuckle caused him to go into loss of control and into a slide; yaw, if you want to call it that, yes.

Q Counterclockwise, correct?

A Yes, it would be.

Ex 5-20

*** Q Now, is it your opinion that this car then sped up following the time it starts sliding?

A Once he got into the slide and everything he had no — Number one, the rear wheel was — right wheel was gone. It was attached, but it was gone. This is a front-end drive vehicle and I would have to assume, having done accidents, that when he got into this position that he had no braking and, according to the math, as he goes into this thing, that he would have put it into a power situation, trying to pull out of it, trying to control it with power ***

Ex 5-23

*** Q (By Mr. Thomas) This 3(b), what does that tell you?

A It tells me that actually there's only — it appears to be only three wheels attached to the vehicle at that time, and it has started into a turn.

Q So you say that because you can only see three tire tracks in photographs 3(a) and 3(b), that that means that there's one tire missing?

***

The witness: It doesn't mean necessarily that there is one missing, but we know from the tire itself and with the theory that the knuckle broke prior to it leaving the road, then depending on the balance

Letter Dep.: Ex 5-24

of the car, whether that car wheel is touching the ground. If the wheel was there, there would either be a wider mark or a fourth mark, depending on the angle of the vehicle.***

Q Is it your opinion then, Mr. Letter, that when the vehicle was off the road, even before we get into the apex of the curve, that this tire is just hanging loose?

A Basically, it would be hanging more or less loose. The tire itself, the wheel, if you look at it in this way, if it broke and went this way, which would have been outwards —

Ex 5-25

*** Q Bottom of the wheel folding inboard. Which way do you say it did?

A I believe the bottom of the wheel folded inboard and also came in contact with — later on when it picked up contact with the gas tank and all. It was still attached because even when we got it lose when you were there we still had to take some bolts out and cut a parking-brake cable.

Ex 5-27

Q Later on what, "it was"?

A Yeah, the tire did come in contact with dirt, as near as we know. Again you're looking — what happened, the tire came off from the inside out, off the rim, halfway off which everybody sees in the photographs, yet we know from the photographs that we have, the tire was sitting like this (indicating).

Q Tucked in with the outside in?

A Yeah with the bottom inward.

Q Bottom inwards?

A Also we know that it came in contact with the gas tank, because we've got the marks, I mean, and matched that.

Ex. 5-28

*** Q (By Mr. Thomas) Can you answer my question?

A If I'm understanding the way you're explaining it, I believe it was at a point that it did not touch the ground, not necessarily when it was in the complete yaw, but definitely it was not touching it when it first left the road; and later on up here, it was.

Ex. 5-31

*** Q And are you saying this part failed under normal road load?

A I think that part failed under what would be considered mostly nor

mal loads.

Ex. 5-32

*** Q As you sit here today, to a reasonable degree of engineering certainty, can you point to the cause of the separation of the knuckle?

A Only to the fact that it separated, and it separated prior and caused the accident.

Q Just so I'm clear, as you sit here today, you can identify a number of potential causes, essentially normal road loads?

A Normal road loads, yes.

Ex 5-34

*** Q *** [I]f a vehicle's flying sideways, digs into the ground, then enough forces are generated there to cause a fracture like we have here?

A I don't believe so. Then it would be far more unsafe to have that part in that vehicle; every time it went into a slide, it could fracture.

Ex. 5-42

Q *** [D]o you believe there were any compressive loads acting on this part at the time of its separation?

A At the time, as long as the piece is attached and the wheels are on the ground and everything else, you have compressive loads, which is the weight of the axle that's in the automobile. Cast iron, which I think we all now agree this thing was, has the ability to take compression loads a lot easier than it will tensile loads, and definitely a lot easier than it will take sheer loads, or sideward loads.

Ex. 5-44

*** Q Yes sir I asked if you —

A (Interposing) I have a little problem, I just would not have selected this particular material for this part because, again, of the load situation. There's too many things that can happen to a tire in a wheel assembly that's attached by a yoke, to be using a nodular case iron on it.

Q To get us down to the nuts and bolts of this, Mr. Letter, is that your criticism of what my client did in this case, was to select nodular cast iron for use in this knuckle?

A No, that's not totally all of the criticism. I think it could have been a better selection of materials, and the

Ex. 5-45

design appears to be questionable when it comes to taking loads like this.

Q You mean the physical shape of the part?

A Physical shape and the weight of the vehicle, the attach points and the loads that go around it.

Ex. 5-50

*** Q What is your alternative, if you have one, Mr. Letter, what would you have —

A (Interposing) Well, I'm not here to design the part, but I would have probably made it out of steel —

Q What kind of steel?

A — and changed the design a little bit.

Ex. 5-54

*** Q Looking at the photograph taken at the scene shortly after, did you find any evidence that you had a bumper ripping through the shoulder, on the ground, anywhere?

A There's a picture in here that looks like almost a piece of metal dragging across the — a little bit of the asphalt that was there.

Q Where?

A. And an arrow is pointing to it. But it is not clear whether that is the case or whether it was a case of another

Letter Dep.: Ex. 5-55

thing. Let me — (Witness perusing photographs.)

***

THE WITNESS: That's a piece of metal that's drug across that area.

Ex. 5-56

Q Now you say you think that's a piece of metal scraping the ground?

A It appears to be a piece of metal that's scraped across that finish out there, and whoever put the arrows on there seem to have picked up on something too.

Q And this is the rightmost area at the lower right-hand corner?

A That's right again —

Q What piece of the automobile do you say caused that mark?

A I'd have to go back and look at the automobile. I'm saying there's a possibility it could have been the right rear bumper, it could have been part of that tire. Until I go back and physically look at it —***

Lewter's Expert Report Ex. 6-2

* * *

3. CONCLUSIONS:

(a) The complaint of noise coming from the front end during turns has not been resolved at this time but could indicate the CV joint was bad. One of the most common symptoms of worn or damaged CV joints, besides lubrication leaks, is a clicking noise in turns or a clunking noise during acceleration from a coasting condition or vibration at highway speeds.

Ex. 6-3

(b) The failure of the right rear "knuckle" which was called a "yoke" or suspension "knuckle" could cause the vehicle to flip over. The type of failure of the knuckle was a sheer failure. This failure caused the brake line to fail. The brake line failure would leave the car without brakes. The lost of the knuckle would also cause the vehicle to flip.

(c) A spectrographic analysis of the suspension bar or "knuckle" yielded a chemical composition which strongly indicated a forged steel that was decarbed or a cast iron. If it had been a case of the knuckle being manufactured from a decarbonized steel then the knuckle would have been brittle and this could result in single sheer failure. The fracture surface strongly indicates a single sheer failure. It should be noted cast iron would yield the same results. If the surface was truly decarbed the hardness test would also yield a low hardness. The Rockwell "B" test yielded a hardness of R "B" 87 indicating a low tensile strength. A low surface carbon and a low tensile strength strongly indicates the bar could not accomplish its desired design objective. If it was "cast iron" the results would also be similar to the above analysis.

(d) The microstructure strongly indicated the material of the "Knuckle" to be manufactured from "Cast Iron".

(e) It appears the right rear "yoke" or suspension bar or knuckle fail[ed]. Mr. McPhail left the road in a skid around sixty (60) miles per hour. The broken yoke or knuckle caused the brake line to shear and the vehicle to flip.

(f) The right side Airbag deployed and the Driver's side airbag failed to work. This is a clear indication the airbag system was defective. The system is set so both airbags will deploy when sufficient impact is made with the front end.

BILLY MIMS DEP. Ex. 7

Ex. 7-3

*** A *** [I]n my personal opinion, during the turmoil that the vehicle went through, if that line had of broke after the fact, the wheel would have been back out of the way, and the spraying would have been out to the wheel housing itself.

Q Okay.

A That's my personal opinion.

Q Just so I'm clear, you think that the brake line flex hose, as you say, fractured during the rollover and all the turmoil that was going on out there, right?

A I would say that it broke

Ex. 7-2

prior to the arm — the knuckle itself.

Q Prior to the knuckle breaking?

A Right, because of the location of where the fluid was on the vacuum plate, which some people call the dust shield.

Q Okay. What I am trying to get around to is where you think that the brake hose broke?

A I think it failed prior to the knuckle.

Q Okay. Where on the roadway?

A That would have had to have failed somewhere in the vicinity of when it left the road, or prior to that.

Q Okay.

A Of course, that goes back to the engineering to say. ***

Ex. 7-6

*** Q Okay. So in your opinion, the most likely scenario is going to be that this vehicle leaves the roadway to the right, something causes the brake hose to get severed, sprays brake fluid in there, and then the knuckle breaks before you get to the asphalt on Two Mile Road?

A That's what it appears to be, yes, sir.

Ex. 7-8

A. Well we can talk about the reservoir not having any fluid in it. The line was broke, true enough, but you've got a metering valve, you've got front wheels and rear wheels. It should not have been empty.

Even with the line broke, the center of gravity won't drain it out unless you open the other end of it. And that cap was dead tight when I removed it and photographed it. No fluid in it, no residue in it at all.

Q. All right. What difference does it make to our case?

A. Well, that goes back to, did all the fluid leave and go out when the right rear wheel broke, or was there not enough in there to supply the two fronts and the left rear? That's my personal opinion.

Ex. 7-9

Q. Any evidence about where the brake fluid went?

A. On the housing, on the right rear wheel, on the dust cover, on the vacuum plate, brake fluid all over that. There was no brake fluid on the other wheel when we did an inspection on the front and on the left rear, that I noticed.

Ex. 7-10

Q. Well, what difference does it make if you didn't find any fluid in the reservoir?

A. Well, with the metering block, as I mentioned a few minutes ago, when that brake line failed, that sensing device on the metering block centered and kept the two front wheels active, you know, when the — the way the system is designed when you lose one brake line. So the fluid should have remained in that reservoir for the two front wheels, so you would have had brakes.

Ex. 7-13

Q* * * * to any of those technical service bulletins, that played any part in this accident?

A. No, sir, I cannot.

Q. Okay.

A. Technical service bulletins are put out based upon, and which they have always been from the meeting with the National Highway Safety Administration. If one fight did occur, or two, or three, or four, there might be a need to check, and that's a technical service bulletin for that.

Q. There might be a need to check.

A. Right.

Q. And there might be one vehicle that might need it, and one vehicle that doesn't?

A. Exactly.

Ex. 7-14

A. * * * And to finish the statement a few minutes ago that I answered about the service bulletins, I don't know, and I don't know whether anybody else knows, when these bulletins came out, there had been some problems

with cars.

Were they having problems at the time the wreck occurred, and then the bulletins followed later on about these other things? I mean, that's — Did they have enough to make the recall, to send it to TSBI? Seem that could have occurred back in '94, and then the bulletins been published in '95 and '96.

Ex. 7-4

BY MR. SALIBA: No, the actual physical evidence of this is —

THE WITNESS: Well, it's still that the amount of debris that's here, and the brake fluid. I still have the opinion, as I stated in my report, that it was broke prior to that knuckle failure.

Q. (BY MR. SALIBA) But if that car was flipping, that fluid would probably have gone out and not gotten on that tire, wouldn't it?

A. That's the thing, the fluid would not have been, because the tire wouldn't have been there, it would be back out of the way, you know, if the failure had occurred at that point, but that we have no way of knowing that.

Q. And, now, if this tire were dragged across something, would that tend to make the — And I'll show you Exhibit Mims 4. Would that have made the rubber on the tire to move in the

Ex. 7-15

opposite direction from which the wheel was being drug?

A. Sure, it would have pulled it off. If you said it was being drug, it would have pulled the tire off of it, yes, sir.

Q. All right. Do you see any evidence that tire was drug?

A. Well, you can see that on here, on the tire and on the rim, too.

Q. Now, if you were familiar with all of these TSBs, I assume you have studied them?

A. Yes, sir.

Q. What is the normal lead time to bring out a technical service bulletin if you are experiencing problems with a product that affected all '94 Galants? How long from the date of manufacture would you normally expect the technical service bulletin, saying here's a problem to actually be issued by the manufacturer?

Ex. 7-16

A* * * the evidence that you had before, I believe our other photograph showed that the rim was drug across. And this occurred as it went through this gravel leaving that asphalt there, one of the two, to do that, because that's

the debris that's there.

And you are talking about as far as where it left the road here, at the time of when the fuel line — the brake line broke or the failure of the knuckle.

Q. What I'm asking is that isn't it true that at some point, the tire was being drug off the wheel, as if the car was in, I said, a clockwise skid?

A Well, it shows that the tire was drug and the rim was drug. In a clockwise skid? Well, if it was traveling in a curve to the left in a clockwise, yes, sir, that would be clockwise, if you — I think that would * *

Ex. 7-17

Q * * * wouldn't have any disbelief with that, would you?

A No, that's no way of knowing. I'd have no dispute with that at all, it could have very well happened.

Q So, if you would, tell us what your opinion is based on, that the car left the roadway before the yoke broke.

A Well, the opinion that I had on that was stated earlier, that the brake hose failure on the right rear wheel occurred prior to it leaving the road, and it caused the debris, and dust, and stuff to be stuck to it, which could have come from any location, but that's just my personal opinion. And this would have had to break and come up under the car, and you wouldn't have any brake fluid on the back of that vacuum plate if it had happened the other way.

Ex. 7-18

Q * * * as opposed to going against the right rear? I'm calling on your expertise here as an accident investigator, or a fire investigator, and so forth, assuming in that capacity that you deal with fluids, and the spraying of fluids.

A. We do, I do, yes, uh-huh. (Witness indicates affirmatively.) This occurred when this line broke, and it sprayed this, and the knuckle went back under there, it goes back to the metering block we talked about while ago.

The spraying, if he was coming this way, and the brakes were being applied, and the line had broke, it's going to spray out onto that wheel. As far as it spraying back up under the car, this line is hanging down, it would be traveling, this line is still going to be coming back this direction. It's a possibility for it to spray the * * *

BILLY MIMS REPORT Ex. 8-1

November 26, 1996

* * *

Inspections of vehicle were conducted on March 26, 1994, May 23, July 24, 1994, and July 31, 1996.

Photos were taken of the vehicle referenced above and inspections of the vehicle were conducted at the above times. ***

Accident scene examination was conducted by Mr. Owen Posey, P.E. of Mobile.

Inspection of the vehicle revealed the air bag for the passenger side had deployed. The driver's side air bag did not deploy.

The right rear wheel of the vehicle was broken loose and was being held in place by the emergency brake cable and rear strut arm. The spindle (vertical cast iron mount) and hydraulic brake line was broken and separated. The brake line flex hose had sprayed fluid onto the wheel housing, which indicates the brake flex hose had failed prior to the wheel spindle mount failure.

Information received of complaints by Seaman McPhail regarding problems in the steering of the car, the dimming of the lights and effects on the radio when the brakes were applied could have been related to the control of the vehicle. This also could have caused the loss of control of the vehicle and the reason for the vehicle to leave the roadway, causing the accident.
Inspection of the driver's side door revealed weak structure of the broken weld joints on the side door beam connections.

Inspection and testing of the wiring harness to the driver's side air bag revealed the electrical circuit to be in the open position.

Mitsubishi Technical Service Bulletin (T.S.B.) #93-26-001 May 1993, referenced Service life of the outer Birfield joint drive shaft boot, referenced 1994 Galant as one of the vehicles affected. The noise heard by Seaman McPhail could have been related to the above T.S.B. Mitsubishi T.S.B. 95-34-002 (12-95) on models 94 and 95 Galants was to change the real alignment as referred to the toe control arm. Affected revisions state to change the toe adjustment

valve on the rear wheel alignment. This realignment was not performed on the subject vehicle, and could have been a factor in the control of the vehicle.

Mitsubishi T.S.B. 94-54-003 (11-94) involves the subject vehicle and relates to statements made by Seaman McPhail. Corrections for the problems relating to this T.S.B. are as follows: Install a ECM modulator kit as described in bulletin. Repair orders for warranty repairs failed to show the above modification to have been performed, and therefore this problem existed at the time of the accident.

Mitsubishi T.S.B. 95-35-001 (5-95) for the 94-95 Galant, relating to resistance ohms in the ABS rear brake system. Service repair orders show no evidence that this problem was addressed prior to the accident.

Mitsubishi T.S.B. 95-92B-001 (6-95) and T.S.B. 95-52B-002 (11-95) 94-95 Galants for models with SRS. These bulletins address the connecting of battery cables relating to the SRS. This indicates the air bag system should be checked. As indicated, the driver side air bag did not deploy.

Mitsubishi T.S.B. 95-52B-003 (12-95) states instructions and procedures for checking the SRS front impact sensor. Checking brackets and cable continuity would affect the correct operation of the air bag system.
Newsletter from Mitsubishi #95-FN-3500122 (6-30-95) on models 94-95 Galants with ABS warning light with "ON" condition. When this occurs, there are problems with the ABS, which did occur on the subject vehicle.

Other TSB 95-35-006 (11-95) and 95-35-008 (11-95) relating to trouble codes, further reveal that brake problems did exist in the subject vehicle, driven by Seaman McPhail.

CONCLUSION

T.S.B. by Mitsubishi relate to problems and failures that occurred with the subject vehicle. It is the conclusion of this investigator, that the vehicle should have been removed from service so the corrections could have been performed.

Billy G. Mims, Sr.
Investigator

OWEN POSEY DEPOSITION Ex. 9

Ex. 9-9

Q Now; what did you do on your first inspection of this vehicle on the 25th?

A I inspected it to determine what may have prevented the driver's air bag from deploying. There was some question about problems; Mr. Saliba told me that they complained about a radio problem, lights dimming and a knocking sound. And I was inspecting the vehicle to see if there was something apparent that was related to those problems.

Ex. 9-16

Q * * * this case and getting on down to the allegations, do you intend to offer an opinion that the right rear knuckle connected to the right rear wheels separated, causing this accident?

A Yes, sir.

Q And you've done an analysis in which you're now comfortable in testifying to that?

A In my investigation, the evidence I have found, I would be comfortable in testifying to that.

Q To a reasonable degree of engineering certainty?

A Yes, sir.

Ex. 9-17

Q Matter of fact, your opinion is that the sole cause of this was the knuckle fracture, right?

A That's correct.

Ex. 9-22

Q Not disagreeing; tell me when and why.

A I'm not going to say why it broke, but it's my opinion that it broke before the car left the pavement of the highway.

Q Okay. You have no opinion regarding the mechanism of the tractor?

A The tractor?

Q Do you have a scene diagram that we can look at?

A Well, I've got a rough one here, which is probably — got the accident report, which has a diagram on it; it's better than mine.

Q Show me the exact location where the knuckle broke.

A I can't show you the exact location, I can show you approximately where I think it happened.

Q How far from the tree?

A Probably three or four hundred feet before it reached the tree.

Ex. 9-23

Q That's a good hundred-foot range there, Mr. Posey?

A Yes, it is.

Q Tell me what evidence you have of exactly where the knuckle broke.

A I can't tell you exactly where it broke.

Q Tell me what evidence you have that it broke three to four hundred feet before you got to the tree.

A The path of the vehicle as it left the roadway —

Q Yes, sir?

A — it is my opinion that it broke when it started to leave the roadway.

Q All right, sir.

A And it had begun to turn sideways after it left the roadway, and here's the point on my sketch that I'm indicating about where that — where it left the roadway (indicating).

Ex. 9-24

Q Okay. Can you explain the rest of this to me?

A Okay. Left the road at that point, and the markings that I saw along the road indicated that that's where he left the road and came on down, and they corresponded to skid marks on this asphalt right here. And if you'll notice, here's a skid mark at this point (indicating).

Q That's a skid mark with twenty-nine feet —

A Twenty-nine feet.

Q — marked to it, and another one at fifty-two feet?

A Yes, sir.

Q Now, skid mark, this is not a braking-type skid mark, his is a yaw mark, right?

A Side.

Q Side-sliding?

A Sidewise skid mark.

Ex. 9-25

Q (BY MR. THOMAS:) What you're pointing to, we can see the white line, we can see the edge of the pavement going right, we can then see one tire mark there, another tire mark there, and maybe one down here. Are you calling those three or you're just calling them two up here?

A Well, I'm just calling — Really, these two in the grass is all I can

identify in the grass.

Q All right, sir.

A When we get on the pavement, I can identify three. And if you look * * *

Ex. 9-26

Q Okay. Let me back you up a second. The condition is that you found the knuckle of the right rear tire wheel assembly fractured, right?

A Broken, yes, sir.

Q Broken. Now, other than the fact that it was broken after this car has vaulted through and slammed down and then wrapped itself around a pecan tree, tell me what evidence you found that tended to indicate to you that the right rear wheel knuckle was broken at this point in time as the vehicle crosses across the white stop bar on Two Mile Road?

A Well, number one, there is no evidence on the skid marks that it was even on the ground, particularly not in the place. We should have found something similar to the front marks. The indication of the front marks indicated that the power was on on the front two, but this was a trailing skid mark back * * *

Ex. 9-27

A Well, it's from experience of seeing where an automobile has, as we call it, scratched off in the pavement, as opposed one that's stopping with the brakes on, you have a difference in skid marks to indicate that. And we look at this, we look at this one here, this picture, if you'll notice there, you've got your grains in that tread mark that shows it coming crossways across that.

Ex. 9-28

A I took some measurements while I was there, which is here. I show sixty-eight inches between the front and rear skid marks, which can be translated back to the position of the car to determine which rear skid mark that is.

Q Sixty-eight inches?

A Yes, sir.

Q The basis of your opinion that the knuckle fractured before this vehicle rolled over is because you have three tire marks out there?

A That's part of it, yes, sir.

Q Anything else?

A Well, it leaving the road is another part of it.

Ex. 9-29

Q You can't testify that there would have been a loss of control of this

vehicle if, in fact, there had been a fracture of that knuckle?

A I can, to some extent, because when that knuckle broke, it also destroyed the braking system, and he had no brakes, as well as having a problem with steering of the vehicle. So I would call that basically out of control.

Q Well, sir, let me back up here just a second. Why do you say there'd be a loss of steering?

A Well, where you have failure of your wheel system like that, and apparently from these skid marks, it appears that he was trying to steer back into the road, and the reason it started going sideways on him.

Q Well, sir, that's pretty consistent with trying to make a curve like that, just going to fast, is it not?

A Could be.

Ex. 9-30

Q You say that gravel marks were found on the car's right side to indicate it was on its side as it crossed Ramsey Road?

A Yes, sir.

Ex. 9-31

THE WITNESS: No, sir.

BY MR. THOMAS: What's the matter with my question?

THE WITNESS: I'll go back to the tire marks. It's evidenced to me that it was not in place when it skidded across that asphalt.

Q (BY MR. THOMAS:) Anything else?

A I think that's it.

Ex. 9-32

Q * * * two-thousand, three-thousand-pound car wraps up around a tree, certainly that impact creates forces sufficient to cause damage to a lot of things, including the suspension system, does it not?

A Well, it could, but not in this particular case on this particular wheel, because this particular wheel was on the outside of the impact.

Q Initially, with the car upside-down — You're saying that this vehicle is upside-down, driver's side contact first, right?

A That's correct.

Q Mr. McPhail is right at the point of attack, right?

A Yes, he is.

Q Okay. And then the vehicle, as I understand it, rotates up and wraps around the tree, did it not?

A Wrapped around the tree, where Mr. McPhail was.

Q Okay.

Ex. 9-33

BY MR. SALIBA:

Q Given these Technical Service Bulletins that have not been identified as exhibits, but which you looked at earlier, if you were to have the data that backed up the issuance of those bulletins, would

Ex. 9-34

Q it help you form, to the degree of engineering certainty, any opinion as to whether any of these defects may have contributed to the accident?

BY MR. THOMAS: Object to the form. I think this witness has already testified that he found no evidence of any of the background information, no matter what other information may exist, having to do with the Technical Service Bulletins.

THE WITNESS: In my investigation of it and related to these, I said it might could have, but I didn't find evidence specifically that it did. Now, I believe what you asked, Mr. Saliba, was, if I had more background information that did identify that, would that change my opinions?

Q (BY MR. SALIBA:) That's right.

A Yes, it could.

Q And did you have an opportunity to look at the background data that

Ex. 9-35

resulted in the issuance of the service bulletins?

A No, sir.

Q Mr. Posey, is it possible for a knuckle or a joint within a harness system, such as the one on the Mitsubishi, to have a part failure, and that part failure, other than a clanking noise or a bump, not show up for some time and then separate?

BY MR. THOMAS: Object to the form.

THE WITNESS: Depending on the type, the part and so forth, but it very well could.

BY MR. SALIBA: That's all I have.

POSEY'S REPORT- Ex. 10-1 through 10-4

November 18, 1996

RE: McPhail v. Mitsubishi, et al
Inspection Report of Accident

* * *

Photographs were taken on March 25, 26, May 23, July 14, 1994, and July 31, 1996, of the wrecked 1994 Mitsubishi Galant vehicle VIN 4A3AJ56G6RE040230 driven by Seaman David Harry McPhail. The accident scene was inspected on March 30, 1994, where Mr. Stork, of the volunteer fire department, and the Navy personnel were interviewed and photographs were taken.

Mr. Chris Stork of the Grand Bay volunteer fire department, who was the first person to the scene after the accident, was interviewed and he gave the following information of the accident. The car veered off the right side of the road as it entered the left turn curve of Hwy. 188 about 200' before impact with a pecan tree.

After leaving the pavement of Hwy. 188, the car (1994 Mitsubishi) was skidding sideways across an asphalt turn-off of 4 Mile Road from Hwy 188. The skid marks of the two front wheels were 52' long and about 30" apart with 68" between front and the one rear wheel mark which was 29' long. The front wheel marks indicated engine power was on. The skid marks as it moved off 4 Mile Road asphalt was 8' front wheel to rear.

The right side of the car was the leading part of the car as it skid across 4 Mile Road. Gravel marks were found on the cars right side to indicate it was on that side as it crossed Ramsey Road, which was gravel and under construction. The car then rolled over sideways about 60' from Ramsey Road to the impact with a pecan tree, crushing the drivers door and car top into the tree.

Mr. Stork stated Seaman McPhail was dead at his arrival. His seat belt was fastened but only the passenger air bag had deployed. The Mitsubishi drivers seat was pushed up against the crushed top.

The evidence at the scene and damage to the car indicates it had left the road, skidding to the right in the upright position across 4 Mile asphalt Road and then rolled over on the right side just before it crossed Ramsey Road. It

skidded on Ramsey road before it rolled across the grass to the pecan tree. It hit the tree at the midsection of car on the drivers door and top in the weak part of the car structure.

Also interviewed at the scene on March 30, 1994, were representatives of the Mobile Navy base as follows, Commander Scott Hickson, LNC. Robert Roemmick and Chief E-6 Barret.

Seaman McPhail had just left a Mobile Home trailer park area before the accident. He had traveled about 1145' before the car began to leave the road on a curve. The pavement of Hwy 188 at the entry to the curve was 29' wide, as measured on November 16, 1995.

The right rear wheel of the car had broken loose and was just hanging by a connection of the emergency brake cable and trailing arm to the rear of the car assembly. The vertical cast iron knuckle mount and the hydraulic brake line were broken in two. The brake line hose had sprayed fluid in the area wheel housing, indicating that it broke before the wheel left the wheel housing.

The failure of the cast iron knuckle wheel support and brake line did occur before the car skidded across 4 Mile Road asphalt since there was only one rear wheel skid mark on the asphalt. This could also account for the rollover of the car just before it left the asphalt and skidded on the right side across Ramsey Road and rolled into the tree.

There was no hazard found along the shoulder of Hwy 188 in the car path to cause the failure of the rear wheel.

The complaints by Seaman McPhail of problems in the steering of the car, the dimming of the light and effects on the radio when the brakes were applied could have been associated with the control of the car. These problems could have caused the loss of control and the reason for leaving the road as it entered the curve, causing the accident.

Contributing causes of the death of Seaman McPhail appear to include the driving problems of the car experienced before the accident, the failure of the driver's side air bag to deploy and the weak structure of the broken welds of the side door beam connections, during the collision on impact. The driver's door skin was knocked off during the rollover.

The electrical circuit to the air bag was tested and found to have been open.

Mitsubishi Technical Service Bulletin (TSB) #TSB-93-26-001 of May, 1993, to increase driveshaft service life was about the outer Birfield joint driveshaft boot. This bulletin pertained to the 1994 Galant as one of the affected vehicles. The popping noise heard by Seaman McPhail appears to have been related to the Birfield joints.

Mitsubishi TSB #TSB-95-34-002 December, 1995, on Model 1994-1995 Galant was for the purpose of adjusting the toe control arm. Bulletin mounting is revised, affected manual revisions, change the toe adjustment graduation value of the rear wheel alignment. This also was an adjustment that was not made and could have effected the control of the car.

Mitsubishi TSB-96-26-001, February, 1996, bulletin introduces a new tool and instruction for replacing the Birfield joint or outside CV joint. Affected vehicles include 1994-1995 Galant.

Mitsubishi TSB-96-26-002, June, 1996, revises information concerning front drive shaft repair kits in the volume 1 service manuals for the 1994-1995 and 1996 Galant.

Mitsubishi TSB-94-54-003, November, 1994, about momentary headlight dimming during deceleration on 1994 or 1995 Galants, vehicles built up to 4/28/94. This includes the McPhail car. To correct the condition was to install an ECM modulator kit as described in this bulletin. The repair record of the 94 Galant driven by Seaman McPhail did not show this problem corrected, which appeared to have existed at the time of the accident.

Mitsubishi TSB-94-52B-001, June, 1994, to update the Supplement Restraint System (SRS) vehicles affected include the 1994 Galant. This pertains to the replacement of items after the deployment of the air bag.

The drivers air bag of the Mitsubishi in the McPhail accident, did not deploy. It appears the air bag system (SRS) was faulty and may have helped to prevent some injury in the McPhail accident had it operated.

Mitsubishi TSB-95-35-001, May, 1995, for models 1994-1995 Galant. This bulletin specifies changes to the standard values of hydraulic unit solenoid valves interval resistance ohms in the ABS rear brake system. There is no evidence that this brake problem had been addressed and could have contrib

uted to the accident.

Mitsubishi TSB-95-92B-001 June 1995 and TSB-95-52B-002 November 1995 for models 1994-1995 Galants for all models with SRS. These bulletins pertain to the connecting of the battery cables relating to the SRS. Again this indicates air bag problems.

TSB-95-52B-003 December 1995 pertains to 1994-1995 Galants introduces an additional procedure for checking the SRS front impact sensor. This is to check for sensor brackets and cable continuity problems that could effect the operation of the air bag.

Mitsubishi newsletter #95FN3500122 June 30, 1995, on models 1994-1996 Galant on ABS warning light "on" condition. The bulletin is on the correction on a warning light problem. This shows problems that did exist in the ABS brake system.

Mitsubishi TSB-95-35-006, November, 1995, pertaining to models 1994-1995 Galants. ABS brakes troubleshooting of charts for diagnosing "Code 51 - value relay on impossible" and "Codes 41-48 - solenoid valve" trouble codes. This is further brake problems.

Mitsubishi TSB-95-35-008 November 1995 for models 1994-1996 Galants. Further diagnostic trouble codes 41-48, 51 or 52 may also be set in the ABS control unit. This TSB indicates ABS warning light problem to the brake system to be corrected, which apparently existed in the McPhail car.

CONCLUSION:

The problems of the 1994 Galant as admitted to by Mitsubishi in the above TSB's and the corresponding problems that were identified by Seaman McPhail, were in the systems of the TSB's.

It is my opinion that the breaking of the knuckle joint and some of these problems caused Seaman McPhail to loose control of the car which caused the accident and him loosing his life.

Sincerely,
OWEN S. POSEY & ASSOCIATES, INC.

Owen S. Posey, P.E., President

SUMMARY OF INTERVIEW CONDUCTED 13 APRIL 1994, OF MRS. FRANCES MCPHAIL BY NAVY INVESTIGATOR.
EX. 16

* * *

Mrs. McPhail further stated that David went to RM3 Young's father's house first when he arrived from Mayport at approximately 0030, 11 March 1994. She added that David and RM3 Young came over to her house early the next morning. She further stated that David had been driving off-road motorcycles since he was very young, and got his driver's license on 26 January 1989, and had 5 years driving experience. She further stated that David and his father came home from cutting the grandmother's grass at about 1300 on the 18th and that David took a shower and then fell immediately to sleep. Also, she stated that when her and her husband left for dinner at 1730, AEAN McPhail was sleeping. Mrs. McPhail also stated that David McPhail had also complained about the steering on the 1994 Mitsubishi Galant that he had rented and was driving.

R. C. Roemmick
LNC USN

FRANCES McPHAIL DEPOSITION Ex. 17

Ex. 17-2

Q When do you recall that David complained about anything having to do with this Mitsubishi Galant?

A From the time that he came home with it. I rode in it and I heard some noises, but I didn't really think too much about it. I just — you know, even when David said something about it — I just assumed, because he was used to a littler car, and older car, that really nothing was wrong with the car. You don't think there would be anything wrong with a new car.

Q Now, first tell me what David told you.

Ex. 17-3

A He told me that he heard some noises in the car and that he had some problems steering. He said the lights would kind of go dim, too, on him. It was like a popping noise in the steering. And I just didn't think — I just didn't think too much about it at the time. I told him that, you know, he just wasn't used to driving a bigger car.

Q Okay. Let me make sure that I - A (Interposing) Okay.

Q Now, you say that he made some complaints when he first came home, right?

A Yes, he did. He made some —

Q The day that he got there?

A Not the very first minute when he walked in the door, no. I mean, he just — he would make some complaints about it to me, and I just

Ex. 17-4

A didn't think nothing about it.

Q How many times did he tell you there was any problem with the car?

A Maybe five times, just — you know.

Q As we talked about earlier, please don't guess.

A I couldn't tell you how many times exactly. I know he mentioned it more than once.

Q More than one time?

A More than one time.

Q Did he do it that very first day that he was there at your house, which would have been March the 11th?

A I couldn't — I can't tell you the very first day, no. To be honest, I can't remember that first day.

Q Okay. Now, you said it was more than one time that he complained about it?

A Yes.

Ex. 17-5

Q More than that, you can't be any more specific, right?

A No. When I rode in the car, I heard a few noises, too, but I didn't think nothing about it. We were all just sitting and talking in the car, riding in the car.

Q Okay. First, he told you about this before you rode in the car?

A Right.

Q Or were you in the car when he first told you?

A No, no, no. He told me about it before he rode in the car — before I rode in the car.

Q Now, I just need to know what he told you first, and then we'll get around to what you heard, if anything.

A Okay.

Q He said he heard noises in the car?

A He heard like a popping

Ex. 17-6

A noise.

Q Where?

A Around the front area of the car, you know.

Q A popping noise?

A Yeah. He thought maybe it was like coming from the right front.

Q Now, just so I'm clear about this, Mrs. McPhail, is it your testimony there today that when your son, David McPhail, came home from leave between the 10th and the 19th of March, 1994, that he came in and he told you that he was hearing popping noises —

A (Interposing) He said —

Q — in the front end — excuse me — in the front end of his car?

A Right.

Q And that he thought it was coming from the left front?

A Around the left front area

Ex. 17-7

A Around the driver's area, hearing a noise.

Q Okay. The driver area. Not necessarily up in the front of the car, up by the wheels or the engine or anything, but somewhere around where he was sitting?

A Yes, somewhere around in the front end, driving — I mean, when you hear a noise, it's kind of like you hear it in stereo or surround sound, but you don't know exactly how to pinpoint a sound.

Q Now, did he tell you that he heard any other noise?

A Just a — no, no other noises that I can think of. Just a popping noise.

Q Okay. That was one. Do you know, number two, he said that he was having trouble steering?

A He said it was like jiggling, you know, vibrating a little

Ex. 17-8

A bit. (Indicating.)

Q Can you describe it any more specifically than that, what he told you?

A He told me the headlights would dim on him.

Q Well, before we get to that —

A (Interposing) Oh, okay.

Q — I'm talking about the vibrating.

A Well, that would — I don't know if that would be a noise. You'd

feel something there.

Q Right. You said he complained that he was having trouble steering his car.

A He had trouble steering the car.

Q And that what he said was that it was vibrating, the steering wheel was vibrating?

A Well, the steering

Ex. 17-9

A vibration. That's what I'm talking about. If you're having trouble steering, you will fell a little tension.

Q Like a little jiggling in the steering wheel?

A A little tension. Yeah, a little tension.

Q Anything else he told you about having trouble steering?

A No.

Q And third, he told you that the lights would dim?

A (Nods head affirmatively.) They were dimming on him, kind of radio, electrical-type stuff. The dashboard lights, I guess, and the headlights.

Q Is this what he told you?

A Right. This is what he told me.

Q And the radio?

A Well, I guess it would cut

Ex. 17-10

A in and out. I don't know too much about the radio, as I do the — he was telling me the headlights.

Q I need to know specifically, Mrs. McPhail, what he told you was happening, okay?

A He was having trouble with the car.

Q Well, specifically having to do with the lights that we were just talking about, and the radio, tell me specifically what you recall David telling you.

A He said the headlights would dim on him, flicker.

Q The headlights would?

A Yeah. They would flicker.

Q Did he tell you this had caused him any trouble?

A No.

Q He just noticed them flicker?

A Yeah. I mean, he didn't —

Ex. 17-11

A I guess he didn't think no more about it. If — he felt like if he told

Mom or Dad, you know, it would go away or whatever. The problem would be fine if we told him it was okay. He felt safe in the car.

Q Now, what about the dashboard lights and the radio? Do you recall him specifically telling you that the dashboard lights and the radio would do something?

A He did. He said something about the dashboard lights dimming on him, headlights. It's like — the word I'm trying to find — altogether. They were simultaneously.

Q What about the radio? Do you actually recall him saying anything about the radio?

A No, I — at this moment I can't say that I really remember him saying — if he had the radio on at the same time that the lights would go dim,

Ex. 17-12

A it would kind of — like a static in it, not actually go out, but static on it or something.

Q Okay. Mrs. McPhail, you know I wasn't there, so I'm depending on you to tell me what David told you.

A I know. I'm having a hard time remembering exactly every word he said now. I mean, when you —

Q Do you recall David saying anything about the radio?

A I do remember him saying something about the car more than once.

Q No, the radio, I mean.

A He didn't always have the radio on, but when he had it on — yeah, he did. He said something about it. But I don't remember exactly what. It might have, like I said, had some static on it when the lights would go dim at the same time, the lights would flicker.

Q I just need to know,

Ex. 17-13

Q Mrs. McPhail, do you actually recall him telling you that?

A Yes. He just didn't have the headlight problem except when he was driving at night, so the radio didn't do it all the time either.

Q Your recollection of what David told you about that issue is that at some point in time the headlights, the dashboard lights and the radio — well, the headlights and the dashboard lights would both dim and the radio would have static at the same time?

A Right.

Q Did you actually see this happen?

A Yes, sir. I rode in the car with him one afternoon. I heard that popping noise. I was facing him. I was not actually sitting straight in the seat.

And I was kind of facing him, looking at him, and I could hear a noise. And like I said, it would be

Ex. 17-14

A coming into my right ear, so it sounded like it was coming from the front of the car, more than his side.

Q Okay. Let me back up a little, Mrs. McPhail. You actually rode with David one afternoon?

A It was towards the evening hours. It was evening hours. And then when we came home, it was dark.

Q What day was this?

A That would have been — I believe it was the 12th. We went to Quincy's for lunch — I remember going to Quincy's for lunch with my daughter, and we went over the Youngs' house that evening — or late afternoon, and then that evening we came home.

Q You and David went over to the Youngs' house?

A Yes. And I believe my daughter was with us, too. I can't remember. I believe she was.

Q This is Frankie Young's * * *

Ex. 17-17

Q So on the way over there —

A (interposing) I wasn't paying no attention to the car going over, but I was paying attention coming back, because it sounded louder. David said something about it. That's — he said something about it then. And I listened and I really didn't think much about it. I didn't — I don't know much about cars.

Ex. 17-19

Q How far away is that from Quincy's, roughly?

A Twenty miles, twenty-five miles. I don't know.

Q Just so I — you went from Semmes to Quincy's on Airport Boulevard. Then you went from Quincy's to the Youngs' house 20 miles away. And during that time, you don't recall hearing any noise of seeing anything wrong, Right?

A No. It was daytime. We wouldn't see no headlights dimming or see any electrical problems.

Q Didn't hear any noises, though, right?

Ex. 17-20

A I don't remember hearing a popping noise then. I didn't —

Q I'm just trying to find out, Mrs. McPhail. Now, you stayed at the Youngs' house for some period of time; and then did you leave their home and drive back to Semmes, Alabama, to you all's house?

A Right.

Q How far is that?

A it would be the same distance, about 20, 25 miles, I believe it is. I'm really not sure of the exact mileage.

Q Was David driving the whole time?

A Right.

Ex. 17-21

Q Now, tell me specifically, as best you can recall, what you remember about the ride home and any problems that you witnessed with this car.

A Out of the corner of my eye I did see a flicker and it was the — I knew it had to be the headlights, when we were driving. And we were talking, and I heard some popping noises. And I hear things in my car, but nothing like that.

Q Let me back you up. Where were you sitting?

A Passenger side, front.

Q Okay. And you said out of the corner of your right eye you say a flicker?

A Right. I was facing David

Ex. 17-22

A My head was turned towards David.

Q Okay. You're looking toward David, whose driving?

A Right.

Q You see a flicker?

A Right. The lights kind of dimmed, flickered.

Q How many times did you see this happen?

A That one time. I mean, it didn't do it like — it didn't do it constantly. That's why David didn't really think too much about it, but he let us know he was having some problems.

Q When it did flicker, would it be dim and come right back?

A Yes, it would come back.

Q It wouldn't be like the lights went off?

A Not totally shut down, just dim.

Q I'm just trying to find out,

Ex. 17-23

Q this was not something that was going on, it's just you saw it the one

time on the trip home, 20, 25 miles, right?

A Yeah. I didn't pay any more attention, before or after.

Q Did you notice anything in the dashboard, the radio?

A No, I was looking at David.

Q I'm saying at any time during the trip home.

A No, I didn't pay —

Q Any problems, anything out of the ordinary at all?

A No. I didn't give it a second thought.

Q Okay. Now, you said that you heard a noise?

A It was a popping noise. You know, like a — I associated that popping noise to when David had told me before that he was having some popping — heard popping noises. And so I — when I heard it, I just didn't

Ex. 17-24

A think no more about it either, other than he had said once or twice before that he had had some problems.

Q Describe to me as best you can what you heard.

A I don't know how you describe a popping noise. Pop. I mean —

Q Where did you hear it coming from, Mrs. McPhail?

A Like I said, it sounded like it was coming from the front. Because I was facing David and I heard it out of my right ear and it was coming, like, from the front of me. I couldn't pinpoint it either.

Q Was the popping noise going on all of the time that you were driving?

A No. It was more like when he was turning or something, you know, like, if he was making a turn. You know, it didn't do it constantly, only,

Ex. 17-25

A like, if he was steering the car, like in a turn. That's when you'd hear the popping noise. So it had to come, I guess, from around the driver's area. See, I don't know. I'm not —

Q You're saying it only happened when the car was being turned?

A If you wanted to turn the steering wheel, you'd hear it.

Q Would this noise happen when you turned it both to the left and to the right?

A I couldn't tell you for sure if it was left or right. I just know that when he was turning the car — I guess it would be both ways, because you would hear it both times.

Q I'm just asking you Mrs. McPhail.

A I don't know.

Q Your recollection would be that whenever the car was turning left

or right, there would be the popping

Ex. 17-26

Q noise?

A Right.

Q Would it be a popping noise, as you describe it — which I don't know exactly what that is, but was it some sort of regular sound, like one, two, three, four; or would it just pop one time, then you'd wait and you'd hear something in another minute?

A I couldn't tell you. I'm being honest. I can't describe it. I was just a noise.

Q Again, Mrs. McPhail, I wasn't there, so I don't know. I'm trying to find out your best recollection of what you heard. In the event that you intend to attempt to offer any testimony about that at the time of trial, I need to know, in the most detail that you can give me or the jury, exactly what you heard.

A A popping noise. That's how I can explain it. That's the only way

Ex. 17-27

A I can explain it. I wouldn't say a thump. I wouldn't say grinding. I wouldn't say — it's more like a pop. I can't describe the work "pop" to you. I mean —

Q Was it a metal-to-metal sound?

A (No response.)

Q Do you know —

A (Interposing) I can't describe it, honestly.

Q Okay.

A I just can't.

Q Now, do you recall this popping happening every time that David would turn the steering wheel?

A Right. I didn't pay much attention to it until he brought it up again, and we were — I had heard it, and he brought it up, and said, "See, Mom, that's the noise I'm talking about." And I'm going "Okay." But I don't really hear it — a heavy noise.

Ex. 17-29

A After the wreck, yes.

Q Tell me what Franklin Young told you.

A He told me that David was having problems with the car, too, and that he thought I should know about it.

Q What did he tell you?

A He said that there was a popping noise in the car, too. He had

driven the car at one point while David was home, but doesn't want to admit to it, I don't think, because he was afraid that he'd get in trouble for driving David's rental car.

Q What else did he tell you?

A That there was some steering problems with it, too. This is things that he told me. So I don't know exactly everything that was wrong with the car, just that there was some problems with it.

Q Anything else that you

Ex. 17-30

Q recall Frankie Young telling you about any problems with the car?

A No. He just told me that the lights dimmed on it, too, and that he had some electrical problems, the dashboard being electrical.

Q You recall Frankie Young telling you that he had problems with the lights dimming and in the dashboard?

A That's what he was telling me.

Q Okay. As far as you know, did that cause any problems to anybody if the lights dimmed?

A Well, it would cause you problems driving at night, yes.

Ex. 17-31

Q but you recall Frankie Young telling you that he saw the lights dim?

A Right.

Q Now, you recall that he told you that he had steering problems with the car?

A He had some problems with the car, is what he told me.

Ex. 17-32

Q Problems with the car. Did he actually tell you he had steering problems?

A Yes.

Q What did he tell you it was like?

A He didn't go into detail. He just said he had problems steering the car.

Q Anything else he told you?

A I can't remember.

Ex. 17-33

Q * * * conversations with Frankie Young. Is it your recollection that he told you he had driven this vehicle, or that he had not?

A He told me he had driven it. He didn't want to admit it to anybody

else because he was afraid he'd get in trouble because it was David's rental car.

Q Anything else that you remember him telling you about this car?

A He did tell me — you didn't ask me directly. That's why I didn't answer you. But he did tell me that when he put his foot on the brake, that's when the lights would dim. But you didn't ask me that directly.

Ex. 17-34

Q Now, you said Frankie Young told you that?

A Frankie told me that. In fact, I gave the phone — Frankie was at my house and he was telling me all of this. And I gave the phone to Mr. Saliba, because I was talking to Saliba at that time, and I said, "You tell Mr. Saliba what was wrong with the car." It's like people would tell me things and I would turn around and tell them to tell other people or I'd write it down and give it to — I gave everything I had to the Navy at the time. I do not have anything in writing now.

Ex. 17-35

Q When did this happen?

A A couple of nights — maybe the night of the wake. Frankie come to me and told me that was the problems that he was having with the car.

Q He came to you? I thought you were on the phone.

A No. Frankie was at the house the night of the — it was either the night of the wake or before the night of the wake they came to our house, the Youngs did, and Frankie was telling me all of this. And I said, "Tell this to Mr. Saliba." And I got Mr. Saliba on the phone and made Frankie — or asked Frankie to tell Mr. Saliba what he heard, so he could remember.

Ex. 17-38

Q Okay. Tell me what Tammy told you.

A She told me that David was having problems with the car, too.

Q What did she tell you?

A I don't remember, just the same things. Everybody was concerned that I should look into the car.

Q Do you specifically recall what Tammy told you about problems with the car?

A (Shakes head negatively.) No, I can't — I couldn't tell you that now.

DANIEL McPHAIL DEPOSITION. EXHIBIT 18

Ex. 18-1

Q Let's talk about this car, Mr. McPhail. Did David ever tell you he was having any trouble with it?

A Yeah.

Q Tell me about it.

A He just said he was having trouble. It was making noise on the front end and the lights was dimming on him.

Ex. 18-2

Q having problems steering?

A He might have, but I really can't remember.

Q As you sit here today, you don't recall that?

A No.

Q He said it was making noise on the front end. Can you describe to me what he told you?

A Well, when he mentioned it to me, I told him like a CV joint, you know, it's got a snapping in it. And I never did look at it. Other than that, I don't know.

Ex. 18-5

Q Did you tell him to take it somewhere and have it checked out?

A No.

Q How come?

A I didn't think he knew what he was talking about, to tell you the truth. Because it was a newer car, compared to that other car he was driving. You know, I just didn't believe there was anything wrong with the vehicle.

CINDY WEAVER'S DEPOSITION. EXHIBIT 19

Ex. 19-1

Q And during that time, did Mr. McPhail ever voice any complaint on the way to Thunder's about how the car drove?

A Yes.

Q What did he say?

A He said that there was something in the steering. I don't know what it was, I don't know nothing about cars, I couldn't tell you. He said there was something wrong with the steering.

Q When was this trip over to Pascagoula to go to Thunder's?

A When?

Q Yes, about how far before the day of the accident?

A Two or three days.

Ex. 19-2

Q Did you ever hear David complain about the car or was it just that one time?

A He said something about it, like

Ex. 19-3

A the first day he come over to the house, and he said something about — something about the steering again. That was the only two times I heard him say anything remotely wrong with the car, was when he first came over and then the night we went to Thunder's, I don't know.

Q Those are the only two times you ever heard him say anything?

A And both times was about the steering, it wasn't — Nothing else was said about anything.

Q He never said anything about a noise or anything like that?

A No, sir.

Q Just the steering. Was it just a general statement about this steering seems funny?

A Yeah.

Ex. 19-4

Q (BY MR. SALIBA:) Well, let me repeat the question, just to make sure. How did you first become aware that there was some belief that the car itself caused the accident, rather than the way David was driving?

A When the people from the Mitsubishi company come to my house and started questioning me about the car.

SUMMARY OF INTERVIEW BY NAVY INVESTIGATOR ON MARCH 31, 1994 WITH MS. CYNTHIA J. WEAVER CIV. Exhibit 20

Ms. Weaver stated that she was the girlfriend of AEAN David H. McPhail and knew him approximately three weeks. She stated she also knew his close friend RM3 Franklin (Frankie) D. Young and that she resides at the above address with Frankie's fiancee, Tammy D. Robinson. She related that on the 18th of March 1994, David arrived at her residence at approximately 2030. At 2215 Frankie drove her to work at the '76 Truck Stop on I-10 in

Grand Bay, Alabama. She stated that Frankie drove her because he had to pick up his fiancee, Tammy, who also works at the '76 Truck Stop and was getting off of work. Further that at the same time they were leaving to go to work, David was leaving with Philip Whitton to go to the store and get beer. She says she called David at the trailer from her work at 0020, 19 March 1994, to get a ride home from work, but after he didn't show up, she got a ride from a fellow worker. She additionally related that on the way home, they passed the scene of the accident and stopped and found out it was David who had been involved in the accident. She further stated that it was very foggy at the scene of the accident. Further, she did not remember the date and she did not go with him, but stated that David told her he had gone to Providence Hospital and that they had prescribed "depressants" to him, however, she claims he told her he had taken one at the hospital at 2000 and one at 0000 and then threw the bottle away because the medication was making his hands shake. Finally, she stated that David has been complaining about the steering and a funny sound or noise in the front end of the 1994 Mitsubishi Galant, the vehicle David was driving when the accident occurred.

R.C. ROEMMICK
LNC USN

SUMMARY OF INTERVIEW CONDUCTED 31 MARCH 1994, WITH MS. TAMMY D. ROBINSON, CIV. EXHIBIT 21

She stated that she knew AEAN David H. McPhail as he was the best friend of her fiancee, RM3 Franklin (Frankie) D. Young. She stated that Frankie picked her up from work approximately 2300, 18 March 1994, and took her back to the trailer. She related that she saw David drink "at least one beer" between 2300, 18 March and 0020, 19 March 1994. She said the last time she saw David was when he left at 0020 to pick up his girlfriend, Cynthia, at the '76 Truck Stop. She said that Frankie left approximately 0025 to drive another friend of theirs (Joseph) home. She was not with Frankie, but claims when Frankie came back to the trailer he told her that he had not seen the accident on his way to drop off Joseph, however he did not stop at the scene, and when he got home she started calling the police to get information about the accident. She said she got the state police who told her the car was a 1994 Mitsubishi Galant that was involved in the accident. Further, she stated that Frankie did not at any time go to the scene of the accident. Finally, she said David had complained about the steering of the vehicle and a "funny"

sound in the front end of the car.

R.C. ROEMMICK
LNC USN

SUMMARY OF INTERVIEW CONDUCTED 8 APRIL 1994, WITH DR. MATTHEW T. BARNHILL, JR., PH.D., TOXICOLOGIST, ALABAMA DEPARTMENT OF FORENSIC SCIENCES, MOBILE REGIONAL LABORATORY, MOBILE, ALABAMA. EXHIBIT 28

Dr. Barnhill stated that the peripheral blood would be more accurate in the case of an accident victim. He related that when a person is in an accident of the type David McPhail was in, the body reacts automatically pumping all the blood to the brain, therefore, the blood contained in the peripheral (leg) would be a truer reflection of the actual blood alcohol content in the body.

R.C. ROEMMICK
LNC USN

EXCERPTS FROM FLORIDA CASE INVOLVING VALUE RENT-A-CAR

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT, IN AND FOR SARASOTA COUNTY, FLORIDA

CASE NO. 95-6833-CA-01

JEFFERY P. KOEHN, an individual

Plaintiff,

vs

VALUE RENT A CAR, INC., a Florida corporation,

Defendant.

DEFENDANT VALUE RENT-A-CAR, INC.'S RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES

Defendant, VALUE RENT-A-CAR, INC. (hereinafter "VRAC"), by and through its undersigned counsel, pursuant to Rule 1.340, Fla.R.Civ.P., hereby responds to Plaintiff's First Set of Interrogatories as set forth below.

PRELIMINARY STATEMENT AND OBJECTIONS

The model of vehicle at issue in this case, a 1994 Mitsubishi Galant ("1914 Galant"), was not designed, manufactured, or assembled by VRAC. Further, VRAC did not design, manufacture, or assemble the components of the subject vehicle that it understands are at issue in this case (i.e., the brake system, driver's air bag, and driver's seat belt).

VRAC objects to these interrogatories insofar as they appear to seek information relating to vehicles, or to components thereof, not involved in this action, or to circumstances dissimilar to the incident at issue. In so doing, plaintiff seeks information which is not relevant to the issues in this matter and which is neither admissible nor reasonably calculated to lead to the discovery of admissible evidence. As such, the extraneous information sought is beyond the scope of discovery. Therefore, unless stated otherwise, VRAC's responses are limited to those matters concerning the 1994 Galant and the components thereof which VRAC understands are at issue herein (i.e., its brake system, driver's air bag, and driver's seat belt), and to incidents involving circumstances similar to this action, which VRAC understands to have involved a frontal collision by the subject vehicle into the rear of another vehicle.

VRAC further states that plaintiff seeks discovery by the use of overly broad interrogatories. VRAC objects to plaintiff's interrogatories to the extent that they are not susceptible of reasonable interpretation or limitation and to the extent that they present a greater burden than that imposed by the Florida Rules of Civil Procedure. To the extent that plaintiff has sought to ascribe special meanings or definitions to words used in these interrogatories, VRAC has declined to accept those specialized meanings and definitions and has interpreted all words in accordance with their ordinary and customary

meanings.

VRAC objects to plaintiff's interrogatories to the extent that they request information or documents not in VRAC's possession, custody or control, or which are no longer in existence. VRAC objects to interrogatories that purport to call for information in the possession, custody or control of others, or which call for VRAC to state what other entities may have done or may know, or which call for VRAC to supply information or documents which are a matter of public record or otherwise available to plaintiff. Such information can be sought by plaintiff through other proper discovery processes, and to impose such an obligation upon VRAC is beyond the scope of permissible discovery and would impose an undue burden and expense on VRAC.

VRAC objects to the extent that plaintiff's interrogatories would require the disclosure of material or information privileged from discovery by virtue of the attorney-client privilege, or the work product doctrine, or which concern matters prepared in anticipation of litigation. VRAC also objects to interrogatories that seek confidential commercial information, until after entry by the Court of an appropriate protective order.

The response provided herein have been prepared after a due and diligent search conducted in connection with plaintiff's interrogatories. In responding to plaintiff's interrogatories, VRAC has conducted a search for and review of data and documents in those areas where information of the type requested would be expected to be found if it still exists, and has made reasonable inquiry of those individuals who would be expected to be aware of the information sought. VRAC objects to a broader scope of inquiry as unduly burdensome and oppressive. VRAC objects to the use of the terms "any" and "all".

VRAC has not completed its investigation and discovery. VRAC provides the following responses based upon information available to it at the time these responses are served. VRAC reserves the right to use during litigation and up through trial any information developed through VRAC's investigation, discovery, trial preparation and/or otherwise, which was not known when these responses were served. VRAC reserves the right to supplement or amend its responses as appropriate.

By referring to materials pursuant to these interrogatories, VRAC does not stipulate or otherwise admit that any such materials are authentic, relevant or admissible. VRAC expressly reserves all objections to admission of

such materials provided by the Rules of Procedure and Evidence.

VRAC objects to plaintiff's interrogatories as a whole on the above grounds. In order to avoid repetition, VRAC incorporates these objections into each of its responses set out below, where the form or context of the interrogatory so requires, as if these objections were set forth in their entirety in each response.

INTERROGATORIES AND RESPONSES

1. What is the name and address of the person answering these Interrogatories, and, if applicable, the person's official position or relationship with the party to whom the Interrogatories are directed?

RESPONSE TO NO. 1:

See attached Verification.

2. Describe any and all policies of insurance which you contend cover or may cover you for the allegations set forth in Plaintiff's Verified Complaint, detailing as to such policies the name of the insurer, the name of the policy, the effective dates of the policy, the available limits of liability, and the name and address of the custodian of the policy.

RESPONSE TO NO. 2:

VRAC states that with respect to the incident at issue it understands that it is covered under a product liability policy issued to Mitsubishi Motors Corporation ("MMC") by The Tokio Marine and Fire Insurance Company, Ltd., of Tokyo, Japan, in an amount which VRAC believes should be sufficient to satisfy any judgment which may be rendered against VRAC in this action.

3. Describe in detail how the incident described in the Verified Complaint happened, including all actions taken by you to prevent the incident.

RESPONSE TO NO. 3:

VRAC states that it understands that plaintiff, while driving the subject vehicle, hit the rear of another vehicle in front of it. VRAC further states that the Florida Traffic Crash Report for the subject accident states that plaintiff's careless driving was a contributing cause to the subject accident, and that plaintiff was issued a citation for careless driving. VRAC further states that it has not completed its discovery, and VRAC reserves the right to supplement this response.

4. Describe in detail each act or omission on the part of any party to this lawsuit that you contend constituted negligence that was a contributing legal cause of the incident in question.

RESPONSE TO NO. 4:

VRAC states that the Florida Traffic Crash Report for the subject accident states that plaintiff's careless driving was a contributing cause to the subject accident, and that plaintiff was issued a citation for careless driving. VRAC further states that it has not completed its discovery, and VRAC reserves the right to supplement this response.

5. State the facts upon which you rely for each affirmative defense in your answer.

RESPONSE TO NO. 5:

VRAC states that it relies on the fact that the Florida Traffic Crash Report for the subject accident states that plaintiff was cited for careless driving in violation of F.S. § 316.1925(1) in connection with the subject accident. In addition, VRAC relies on the fact that the Florida Traffic Crash Report for the subject accident states that there were no defects in the subject vehicle, including its brakes. VRAC further relies on the fact that the Florida Traffic Crash Report for the subject accident states that the investigating officer tried the subject vehicle's brakes and found them to be in working condition.

VRAC further states that several of its affirmative defenses are based on procedural and substantive deficiencies contained in plaintiff's Verified Complaint. The basis for each such affirmative defense is specifically stated

in VRAC's answer to plaintiff's Verified Complaint.

VRAC states that it has not completed its discovery, and VRAC reserves the right to supplement its response.

6. Do you contend any person or entity other than you is, or may be, liable in whole or part for the claims asserted against you in this lawsuit? If so, state the full name and address of each such person or entity, the legal basis for your contention, the facts or evidence upon which you contention is based, and whether or not you have notified each such person or entity of you contention.

RESPONSE TO NO. 6:

VRAC states that plaintiff is fully liable for the claims asserted against VRAC in this lawsuit, and refers plaintiff to its response to Interrogatory No. 4. VRAC further states that it has not completed its discovery, and VRAC reserves the right to supplement its response.

7. List the names and addresses of all persons who are believed or known by you, your agents, or your attorneys to have any knowledge concerning any of the issues in this lawsuit; and specify the subject matter about which the witness has knowledge.

RESPONSE TO NO. 7:

VRAC refers to Exhibit "A", which is appended hereto and incorporated herein. VRAC states that it has not completed its discovery, and VRAC reserves the right to supplement its response.

8. Have you heard or do you know about any statement or remark made by or on behalf of any party to this lawsuit, other than yourself, concerning any issue in this lawsuit? If so, state the name and address of each person who made the statement or statements, the name and address of each person who heard it, and the date, time, place, and substance of each statement.

RESPONSE TO NO.8:

VRAC states that plaintiff made a signed statement on the Acknowledgement of Responsibility for Damage for, dated October 25, 1993, which states: "Renter is refusing to accept liability for vehicle due to brake failure, seat belt failure and neither air bag deploying." Additionally, the October 25, 1993, Florida Traffic Crash Report for the subject accident states: "Vehicle 1 driver stated his brakes failed the first time he applied but worked the second time but he couldn't stop in time to avoid hitting vehicle 2."

9. State the name and address of every person known to you, your agents, or your attorneys who has knowledge about, or possession, custody, or control of, any model, plat, map, drawing, motion picture, videotape, or photograph pertaining to any fact or issue involved in this controversy; and describe as to each, what item such person has, the name and address of the person who took or prepared it, and the date it was taken or prepared.

RESPONSE TO NO. 9:

VRAC objects to this interrogatory to the extent that it seeks information privileged from discovery by virtue of the attorney-client privilege, the work product doctrine or nondiscoverable matters prepared in anticipation of litigation. Without waiving its objection, VRAC refers to the Florida Traffic Crash Report for the subject accident. VRAC further states that it has possession of 4 photographs of the subject vehicle taken on or about October 26, 1993, and 16 photographs taken of the subject vehicle on or about November 5, 1993, all of which will be produced.

10. Do you intend to call any expert witnesses at the trial of this case? If so, state as to each such witness the name and business address of the witness, the witness' qualifications as an expert, the subject matter upon which the witness is expected to testify, the substance of the facts and opinions to which the witness is expected to testify, and a summary of the grounds for each opinion.

RESPONSE TO NO. 10:

VRAC has not yet determined which experts, if any, it intends to call at trial. VRAC reserves the right to supplement its response.

11. Have you made an agreement with anyone that would limit that party's liability to anyone for any of the damages sued upon in this case? If so, state the terms of the agreement and the parties to it.

RESPONSE TO NO. 11:

VRAC states that it made no agreements that would limit liability for damages to this case.

12. Please state if you have ever been a party, either plaintiff or defendant, in a lawsuit other than the present matter, and, if so, state whether you were plaintiff or defendant, the nature of this action, and the date and court in which such suit was filed.

RESPONSE TO NO.12:

VRAC objects to this interrogatory on the ground that it is not limited to the 1994 Galant, to its component at issue, or to circumstances similar to the incident at issue, and thus it is overly broad and unduly burdensome, and seeks information that is not reasonably calculated to lead to the discovery of admissible evidence. Without waiving its objections, VRAC states that a review of its records reveals no lawsuit in which VRAC was a plaintiff, and one other lawsuit in which VRAC was a defendant, in which it was alleged that the driver of a 1994 Galant was injured in a frontal impact due to claimed defects in that vehicle's brake system, drier's air bag, and/or driver's seat belt:

Frances McPhail as administratrix of the Estate of David Harry McPhail, deceased, Plaintiff v. Richard's Garage of Mobile, et. al., filed on or about January 8, 1996, in the Circuit Court of Mobile County, Alabama, CV No. 96-79.

13. Did any mechanical defect in the motor vehicle at the time of the incident described, in the Verified Complain contribute to the incident? If so, describe the nature of the defect and how it contributed to the incident.

RESPONSE TO NO. 13:

VRAC states that it is not aware of any mechanical defect in the subject vehicle at the time of the subject accident.

14. List the name and address of all persons, corporations, or entities who were registered title owners or who had ownership interest in, or right to control, the motor vehicle that the Plaintiff driver was driving at the time of the incident described in the Verified Complaint; and describe both the nature of the ownership interest or right to control the vehicle, and the vehicle itself, including the make, model, year, and vehicle identification number.

RESPONSE TO NO.14:

VRAC states that at the time of the subject accident, it was the registered owner in the State of Florida of the subject 1994 Galant, VIN 4A3AJ46G8RE014917.

15. If the subject vehicle, or any parts of mechanisms thereof, has been inspected, tested or examined by any person since the accident, state the date and place and identify all persons present. For each such instance, state precisely what was done; by whom; at whose direction; whether any tools or equipment were used, and if so, what equipment or tools; whether the condition of the subject vehicle or any component thereof was altered; whether any marks were made on the subject vehicle or any component; whether any component was removed, and if so, how, why, and by whom, for how long and whether it was replaced; whether photographs, films, videos, sketches, diagrams or measurements were taken; and whether a written or oral report was made, and to whom such a report, if any, was made or shown.

RESPONSE TO NO. 15:

VRAC objects to this interrogatory to the extent that it seeks disclosure of information privileged from discovery by virtue of the attorney-client privilege, the work product doctrine, or which concerns matters prepared in anticipation of litigation. Without waiving its objections, VRAC refers to the Florida Traffic Crash Report for the subject accident. VRAC further states that it has possession of 4 photographs of the subject vehicle taken on or about October 26, 1993, and 16 photographs taken of the subject vehicle on or about

November 5, 1993, all of which will be produced.

16. Identify every person who, since the time of the accident, has had custody of the subject vehicle and each component part of the subject vehicle that has been removed, beginning with the towing company. If any component part has been removed since the time of the accident, for each such part state: the date and place of such removal; the circumstances under which the component was removed; the identity of the person who removed the part; and the present location of the part.

RESPONSE TO NO. 16:

VRAC states that according to the Florida Traffic Crash Report, the subject vehicle was removed from the accident scene by West Coast Towing. Following the accident, the subject vehicle was stored at VRAC's facility at 1150 Rental Car Road in Sarasota, Florida.

VRAC further states that on November 15, 1995, VRAC sold the subject vehicle to Greater Orlando Auto Auction. VRAC has found no record of any component parts being removed from the subject vehicle.

17. State completely and in detail the basis for all allegations made that this Plaintiff, and any other person or entity besides this Plaintiff, including other parties to this action, is liable for the accident or injuries complained of, and as to each, enumerate all of the facts that support each such allegation.

RESPONSE TO NO. 17:

VRAC refers to its responses to Interrogatory Nos. 4 and 5. VRAC further states that it has not completed its discovery, and VRAC reserves the right to supplement its response.

18. Do you have or do you know of any statement from anyone relating to any aspect of this case? If so, identify the statement, the person making the statement, the person to whom it was given and the date it was made. Describe in detail the subject mater of each such statement and identify any documents which relate thereto.

RESPONSE TO NO. 18:

VRAC objects to this interrogatory as a whole as vague and ambiguous. VRAC further objects to this interrogatory to the extent that it seeks disclosure of information privileged from discovery by virtue of the attorney-client privilege, the work product doctrine, or which concerns matters prepared in anticipation of litigation. Without waiving its objection, VRAC refers to the Florida Traffic Crash Report for the subject accident. VRAC further refers to its response to Interrogatory No. 8.

Dated: May 9th, 1996

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ROTH, EDWARDS & SMITH, P.A.
135 West Central Boulevard
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Post Office Box 3831
Orlando, Florida 32802
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Attorneys for Defendant
Value Rent-A-Car, Inc.

VERIFICATION

I, Grant Stevenson, declare under the penalty of perjury, that I am Assistant Claims Manager of Value Rent-A-Car, Inc.; that the foregoing Defendant Value Rent-A-Car, Inc.'s Responses to Plaintiff's First Set of Interrogatories are based upon information supplied by others, as well as corporate documents and that, to the best of my knowledge and information, the facts stated in the afore-mentioned responses are true and correct.

Executed on May 8, 1996.

Grant Stevenson

(3)

No. 98-635

FILED
NOV 16 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1998

FRANCES MCPHAIL, as administratrix of the estate of David Harry McPhail, deceased,

Petitioner,

v.

MITSUBISHI MOTOR SALES OF AMERICA, INC.; MITSUBISHI MOTOR MANUFACTURING OF AMERICA, INC.; VALUE RENT-A-CAR, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Respondents disagree with Petitioner's Questions Presented for Review. The sole question presented for review is whether this Court should exercise its discretion to grant the Petition, when the Petitioner has not shown that the Court of Appeals has decided an important question of federal law in a way that conflicts with relevant decisions of this Court.

PARTIES TO THE PROCEEDINGS

The Petition does not accurately list the parties to the proceedings. The proper parties are:

1. Frances McPhail, as Administratrix of the estate of David Harry McPhail, deceased.
2. Mitsubishi Motor Manufacturing of America, Inc.
3. Mitsubishi Motor Sales of America, Inc.
4. Value Rent-A-Car, Inc.
5. Mitsubishi Motors Corporation, parent corporation of respondents Mitsubishi Motor Manufacturing of America, Inc. and Mitsubishi Motor Sales of America, Inc.
6. Republic Industries, Inc., parent corporation of respondent Value Rent-A-Car, Inc.[1]
7. Alamo Rent-A-Car, Inc. (see footnote 1, below).

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[1] Republic Industries, Inc. ("Republic"), the parent corporation of Alamo Rent-A-Car, Inc. ("Alamo"), purchased Value Rent-A-Car, Inc. ("Value") in mid-1997. Effective November 1, 1997, Alamo and Value were merged and operate as Alamo Rent-A-Car, Inc.

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STATEMENT OF THE CASE

Respondents disagree with Petitioner's Statement of the Case to the extent that it is both factually inaccurate and argumentative.

A. Course of Proceedings and Dispositions in the Courts Below.

On January 8, 1996, Petitioner filed her complaint in the Circuit Court of Mobile County, Alabama against Value Rent-A-Car, Inc. ("VRAC"), Mitsubishi Motor Manufacturing of America, Inc. ("MMMA"), Mitsubishi Motor Sales of America, Inc. ("MMSA"), and Richard's Garage of Mobile ("Richard's Garage"). Petitioner's complaint alleged the existence of numerous defects in a 1994 Mitsubishi Galant, which allegedly resulted in the death of Petitioner's decedent, David Harry McPhail.

On February 8, 1996, MMMA, MMSA, and VRAC (collectively "the Respondents") properly removed the action to the United States District Court for the Southern District of Alabama based on the fraudulent joinder of Richard's Garage. Richard's Garage was merely storing the vehicle following the accident. On March 22, 1996, the District Court denied Petitioner's Motion to Remand and dismissed Richard's Garage.

On February 20, 1997, Respondents moved for summary judgment based on Petitioner's failure to offer evidence to support a *prima facie* case for any of her defect theories. Petitioner filed her response to Respondents' summary judgment motion on March 11, 1997. Exhibit 1 to Petitioner's response was a report prepared by J.

Albert McEachern, Jr., P.E., who had not been offered for deposition, and whose report was not in affidavit form. (Petitioner's Appendix to Petition for A Writ of Certiorari ("Appendix") p. 35.) On March 25, 1997, Respondents filed a motion to strike McEachern's report.

On June 4, 1997, the District Court struck McEachern's report (Appendix p. 7), and granted Respondents' motion for summary judgment. (Appendix p. 19.) On June 12, 1997, Petitioner filed her notice of appeal to the United States Court of Appeals for the Eleventh Circuit. On April 10, 1998, the Court of Appeals issued a written opinion affirming the decisions of the District Court. (Appendix p. 3.) On April 23, 1998, Petitioner sought rehearing *en banc* by the Court of Appeals. On July 16, 1998, the Court of Appeals denied the Petitioner's Application for Rehearing. (Appendix pp. 1-2.)

B. Statement of the Facts.

This product liability action arises out of a single-vehicle accident that occurred on March 19, 1994.[2] Petitioner's decedent, David Harry McPhail, was the driver and sole occupant of a 1994 Mitsubishi Galant, which he had rented from VRAC in Jacksonville, Florida. The 1994 Galant was designed by non-party Mitsubishi Motors Corporation ("MMC"), manufactured by MMMA, and distributed by MMSA.

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[2] The facts of this accident are set forth in the District Court's June 4, 1997 Order granting Respondents' summary judgment motion, starting at page 21 of the Appendix.

The accident occurred at 12:25 a.m. while the Galant was traveling at a high rate of speed north on Alabama State Road 188 in Mobile County, Alabama. The vehicle left the roadway at a sharp left-hand curve, rolled over, and collided with a pecan tree. The impact was to the driver's side of the 1994 Galant. Petitioner's accident reconstruction expert, James Anderson, testified at deposition that, at the time the vehicle left the road, it was traveling approximately 70 mph. The posted speed limit for the curve was 45 mph. Anderson testified that the vehicle slid sideways, tripped, rolled over two and one-half times, and impacted the tree in an upside-down fashion with the driver's side leading. Anderson opined that the vehicle struck the tree at approximately 47 mph. It was undisputedly an extremely severe and violent accident. McPhail died as a result of injuries sustained in the side impact with the tree. An autopsy later revealed that McPhail had a core blood alcohol level of 0.108%.

In her complaint, Petitioner claimed "defects" in the following components of the subject vehicle: (1) the suspension system (specifically the "knuckle");[3] (2) the driver's air bag; (3) the vehicle's passenger compartment;

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[3] The knuckle connects the rear wheel/tire assembly to the vehicle's steering and suspension systems.

(4) the headlights; (5) the steering; and (6) the brakes.[4] (Appendix p. 25.)

Pursuant to the District Court's initial scheduling order, Petitioner was to provide expert reports as required by Fed. R. Civ. P. 26(a)(2) by December 1, 1996, and to offer her experts for deposition by December 31, 1996.[5] The District Court later granted Petitioner an extension until January 2, 1997 to file her expert reports and until February 1, 1997 to offer her experts for deposition. On December 23, 1996, Petitioner's counsel notified opposing counsel that, although a curriculum vita for J. Albert McEachern, Jr., P.E. had previously been provided, Petitioner did not intend to offer McEachern as a witness at trial and did not have a Rule 26 report from McEachern.

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[4] As noted in the District Court's June 2, 1997 Order granting summary judgment in favor of Defendants, Counts Seven through Ten of the Complaint did not state specific causes of action. (Appendix p. 20.) Count Eleven of the Complaint sought an injunction regarding storage and testing of the subject vehicle. The District Court granted summary judgment on Count Eleven because "the parties themselves have resolved the concerns raised in Count Eleven and because plaintiff has not pursued her request for injunctive relief." (Appendix p. 33.)

[5] The facts relating to the District Court's scheduling order and the timing of expert disclosures are set forth in the District Court's June 2, 1997 Order striking McEachern's report as an exhibit to Petitioner's Opposition to Motion for Summary Judgment. (Appendix p. 7.)

Following the depositions of Petitioner's four remaining liability experts, Respondents moved for summary judgment based on Petitioner's failure to offer evidence to support a *prima facie* case for any of the claimed defect theories. Specifically:

1. Petitioner's experts conceded that the fracture to the knuckle of the subject vehicle was a single-event, sheer overload fracture that would have required the application of a side load of 30,000-40,000 pounds of force. However, Petitioner's experts had no possible explanation about what could have caused the fracture prior to the vehicle leaving the road. Further, Petitioner's experts conceded that there was no fatigue or precracking of the knuckle. Finally, Petitioner's experts admitted having no specific safer and practical alternative design for the knuckle.

2. It was undisputed that the driver's air bag did not deploy; but experts for both sides unanimously agreed that its deployment would not have prevented McPhail's death in this side impact collision.

3. With respect to the claimed "passenger compartment" defect, Petitioner presented no evidence that anything about the passenger compartment caused or contributed to the injuries sustained by McPhail.

4. As to the headlight, steering and brake claims, Petitioner's experts conceded that they had no substantiating evidence.

Pursuant to Rule 8 of the Local Rules for the U.S. District Court for the Southern District of Alabama,

Respondents' motion for summary judgment was accompanied by suggested "Determinations of Undisputed Fact and Conclusions of Law." Petitioner's response, in violation of Local Rule 8 and the order of the District Court, failed to indicate that Petitioner disputed any of the facts set forth in Respondents' suggested "Determinations of Undisputed Fact." Rather, Petitioner attempted to avoid summary judgment by trying to fill the holes in her case with a "rebuttal" expert report from McEachern. However, McEachern's report was not at all in the nature of rebuttal expert testimony, but instead was an untimely, last-ditch effort to attempt to make out a *prima facie* case. Respondents moved to strike McEachern's untimely report, which was not in the form of an affidavit, and which was not otherwise verified.

After reviewing the motions, briefs and exhibits filed by the parties, the District Court struck McEachern's report (Appendix p. 7.), and granted Respondents' motion for summary judgment.[6] (Appendix p. 19.) Petitioner appealed both rulings to the United States Court of Appeals for the Eleventh Circuit. Following affirmance, Petitioner unsuccessfully sought rehearing *en banc*. (Appendix pp. 1-6.) Petitioner now seeks review by Writ of Certiorari.

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[6] The District Court also denied a motion for summary judgment filed by Petitioner.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. PETITIONER HAS NOT SHOWN THAT THERE IS ANY COMPELLING REASON FOR GRANTING THE PETITION.

Throughout the history of this action, Petitioner has consistently attempted to confuse the issue with a literal "grab bag" of claims and irrelevant arguments. Unfortunately, that pattern has not changed with the Petition filed before this Court.

This product liability case, which is governed by Alabama law, does not present any novel or complex issue of law. Indeed, this case does not even present a federal question. Petitioner's complaint in the instant action was dismissed because Petitioner had failed to meet her burden under Alabama law. Summary judgment was properly entered and affirmed. Moreover, despite Petitioner's rambling arguments, there are simply no important issues for this Court to resolve. The primary "issues" Petitioner raises before this Court can be addressed in short order.

Petitioner first appears to argue that both the District Court and the Eleventh Circuit erred in requiring Petitioner to comply with the requirements of the Alabama Extended Manufacturer's Liability Doctrine ("AEMLD"), the Alabama common law doctrine that is clearly applicable to Petitioner's claims. (Appendix p. 19.) Contrary to Petitioner's assertions, this case has nothing to do with the National Highway Traffic and Motor Vehicle Safety Act or federal preemption, and certainly does not warrant

review by this Court. Both lower courts analyzed Petitioner's extremely meager evidence, and concluded that Petitioner failed to show a safer, practical alternative design,[7] or to present evidence that the alleged defects were the cause of McPhail's accident or fatal injuries. Accordingly, Petitioner's complaint was dismissed because Petitioner failed to "make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Petitioner simply failed to carry her burden under Alabama law.

The Petition appears to argue that Petitioner could have met this burden through out-of-court statements purportedly made about the subject vehicle, and incorrectly implies that the District Court excluded these statements. There was never any such evidentiary ruling and,

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[7] In fact, the requirement that a plaintiff show a feasible, practical and safer alternative design as a prelude to asserting a product defect is widely accepted in automotive product liability cases. *Huddell v. Levin*, 537 F.2d 726 (3rd Cir. 1976); *Ayres v. Sears Roebuck & Co.*, 789 F.2d 1173 (5th Cir. 1986) (applying Texas law); *Taylor v. General Motors Corporation*, 875 F.2d 816 (11th Cir. 1989) (applying Florida law); *Pacheco v. Coats Co., Inc.*, 26 F.3d 418 (3rd Cir. 1994) (applying Pennsylvania law); *Allen v. Minnstar, Inc.*, 8 F.3d 1470 (10th Cir. 1993) (applying Utah law); *O'Bryan v. Volkswagen of America, Inc.*, 39 F.3d 1182 (6th Cir. 1994) (applying Kentucky law); *Caiazzo v. Volkswagenwerk, A.G.*, 647 F.2d 241 (2nd Cir. 1981) (applying New York law); *Elliot v. Brunswick Corp.*, 903 F.2d 1505 (11th Cir. 1990), *cert. denied*, 498 U.S. 1048 (1991) (applying Alabama law); *Seese v. Volkswagenwerk, A.G.*, 648 F.2d 833 (3rd Cir. 1981) (applying New Jersey law); *Larson v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968) (applying Minnesota law).

in any event, none of the referenced statements are relevant to the requirement of Alabama product liability law that Petitioner present evidence of a safer, practical alternative design.

Petitioner also complains that the lower courts erred in failing to consider McEachern's unverified report. The District Court struck McEachern's report, which was attached as Exhibit 1 to Petitioner's Opposition to Motion for Summary Judgment. Petitioner's tortured argument that McEachern's report was a "rebuttal report" under Fed. R. Civ. P. 26 completely misses the point. As both the District Court and the Eleventh Circuit recognized, the McEachern report was submitted in opposition to Respondents' summary judgment motion. Indeed, Petitioner has been consistent in arguing McEachern's report should have been considered in response to the summary judgment motion. However, McEachern's report was not in the form of a sworn affidavit, deposition or other appropriate form of evidence, and was thus not properly submitted under Fed. R. Civ. P. 56(e). Moreover, McEachern's report was not timely submitted and, as the Eleventh Circuit found, the District Court was well within its discretion in refusing to consider McEachern's report. (Appendix p. 4.)

Petitioner's failure to timely provide McEachern's expert report, or to properly offer verified evidence in opposition to Respondents' summary judgment motion, are clearly not important questions of federal law. The lower courts' rulings in this case are not contrary to any decisions of this Court. Petitioner's failure to comport

with the clear and unambiguous requirements of the Federal Rules of Civil Procedure is simply not an issue that warrants review by this Court.

Petitioner also improperly suggests that Respondents somehow suppressed evidence by purportedly not providing certain photographs in a usable form. What Petitioner fails to acknowledge is that she in fact had opted for laser copies of the referenced photographs, rather than clearer photographic reproductions. Petitioner made this "red herring" argument below, and both the District Court and the Court of Appeals properly disregarded it. Again, this issue does not present any important federal question that would warrant consideration by this Court.

Finally, Petitioner suggests that her product liability case should have been allowed to proceed under either a warranty or common law negligence theory. As reflected in the District Court's Order granting summary judgment, neither argument has merit. The Alabama Supreme Court in *Geohagan v. General Motors Corp.*, 279 So. 2d 436 (Ala. 1973), specifically rejected warranty claims as a basis for wrongful death actions, such as the instant case. (Appendix p. 32.) Further, common law negligence claims have been subsumed by the AEMLD. *Veal v. Teleflex, Inc.*, 586 So. 2d 188 (Ala. 1991). (Appendix p. 25.)

In sum, none of Petitioner's claimed "critical errors" rise to the level of an important question of federal law warranting grant of certiorari. For these reasons, this Court should deny the Petition.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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(4)

No. 98-635

Supreme Court, U.S.
FILED
DEC 11 1998
CLERK

In the

Supreme Court of the United States

October Term, 1998

FRANCES McPHAIL, as Administratrix of the Estate of David Harry McPHAIL, Deceased,

Petitioner,

vs.

MITSUBISHI MOTOR MANUFACTURING OF AMERICA, INC., MITSUBISHI MOTOR SALES OF AMERICA, INC. and VALUE RENT-A-CAR,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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STATEMENT OF THE FACTS

The Statement of the Facts set out in the original Petition for Certiorari are an accurate statement of the facts applicable to this case.

SUMMARY OF THE ARGUMENT

This brief addresses the Defendants' contention that the sole question justifying consideration by this Court is whether the decisions by the lower Courts directly conflict with specific rulings made by this Court and their contention that they do not. This brief points out numerous ways that this Court's Rule 10 is addressed in our Petition For Writ of Certiorari. Of necessity some of this brief touches on the merits of the case as if this were a Rule 24 Brief.

ARGUMENT

Defendants incorrectly argue that the sole question justifying granting of Certiorari is whether the ruling of the Circuit Court has decided an important question of Federal Law in conflict with relevant decisions of this Court.

Although Petitioner's Application for Certiorari was not intended to be a brief on the merits, it shows that the District and Circuit Court decisions not only conflict with the holding of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), requiring that the substantive law of the states involved be applied, but that there are other compelling reasons for granting certiorari.

There is a clear danger of Courts subject to 11th Circuit's supervision deciding defective product cases applying only Alabama's Manufacturer's Extended Liability Doctrine without considering Bailment, Negligence, Wantonness, or Warranty issues.

There is a clear need to forestall a conflict between the 11th Circuit and the Alabama and Florida Supreme Courts on these important matters of substantive law. *Dawson Chemical Co. v. Rohm and Haas Co.*, 100 S.Ct. 2601, 448 U.S. 176, 65 L.Ed.2d 696 (1980) and *Radiant Burners v. Peoples Gas Light & Coke Company*, 81 S.Ct. 365, 364 U.S. 656, 5 L.Ed.2d 358 (1961), are examples of this Court granting certiorari to forestall conflicts.

The decisions fly in the face of and nullify important aspects of Congressional Legislation which preempt contrary holdings regarding a manufacturer's duty in placing a vehicle in interstate commerce. The Statute makes the manufacturer responsible for designing safer vehicles. The Lower Courts shift this responsibility to injured bailees despite the statute making the manufacturers prove to the Secretary that its vehicles, as designed and manufactured, meet certain tests of roadworthiness.

They impose on persons with limited resources the responsibility to come up with a design which the Secretary would approve even though there are already numerous alternate designs on the road.

The rulings also hold for naught state statutes making the bailor of short term rental items responsible for seeing that his products are merchantable and reasonably safe for their intended use by bailees. *Leavitt v. Jane L.*, 116 S.Ct. 2068, 518 U.S. 137, 135 L.Ed.2d 443 (1996) and *Virginia v. American Booksellers Assoc., Inc.*, 108 S.Ct. 636, 484 U.S. 383, 98 L.Ed.2d 782 are examples of this Court reviewing rulings having the effect of nullifying state statutes.

Another reason for certiorari is that the lower Court decisions nullify important aspects of Rule 26 FRCP, creating an ambiguity by their treatment of rebuttal expert witnesses reports governed by Rule 26(a)(2)(C). There are cases which agree with the 11th Circuit in requiring the plaintiff to preguess any rebuttal which might be required to rebut a yet unfiled report.

There are cases which hold that the plaintiff is entitled to 30 days after defendants' expert reports are filed to reply or rebut. Some of these cases are *Knapp v. State Farm*, 94-2420-EEO (N.D.Ill.1995)and *Fuller v. Volvo G.M. Heavy Truck Corp.*, 92C 1797 (N.D.Ill.1995). Also see *B.C.F. Oil Refining, Inc. v. Consolidated Edison Co.*, 168 F.R.D. 161 (S.D.N.Y.1996) and *Dixon v. Certainteed Corp.*, 168 F.R.D. 51 (D.Kan.1996).

There is a third line of reasoning that concludes that reply or rebuttal can only be had with permission of the District Court. *I.B.M. v. Tasco Industries, Inc.*,93-20036 (N.D.Cal.1995).

A fourth line of reasoning is that experts who have previously submitted reports can amend their reports to add rebuttal as being supplementation. *ABB Air Preheater, Inc. v. Regenerative Environmental Equipment Co.*, 167 F.R.D. 668 (D.N.J.1996) Since the District Court struck McEachern's

report on one day and entered Summary Judgment the next day Plaintiff had no opportunity to have Lewter sign the report after the court ruled McEachern ineligible to be a witness.

We are unaware of any other cases requiring a signed report to be sworn to if a Rule 56 Motion is filed, and signing alone seems to be sufficient. *Nguyen v. IBP, Inc.*, 162 F.R.D. 675 (D.Kan.1995); and *Marek v. Moore*, 171 F.R.D. 298 (D.Kan. 1997).

Another reason for granting the writ has to do with the District and Circuit Courts' departure from the usual course of judicial proceedings by deciding fact issues on a Motion For Summary Judgment without consideration of offered proof clearly admissible under Rules 703, 801(d), 803(1), 804(a)(3), and 807 of the Federal Rules of Evidence.

The Courts failed to consider the complaints concerning the car made by the deceased and others prior to the accident. This contributed to their failure to recognize that the evidence clearly showed that the defendants put into the flow of interstate commerce a defective product which failed when put to its reasonably foreseeable use.

The circumstances were such that a jury can reasonably infer that the defendants were aware the vehicle was malfunctioning when they did so.

CONCLUSION

There are numerous reasons for granting the Petition for Certiorari. The effectiveness of Federal and State Statutes designed to protect the public are being seriously compromised by the lower Courts' treatments of this case. Rules of Evidence and Procedure are also being compromised. Old Common Law Doctrines deemed applicable in deciding cases in State Courts are being eliminated when considering factual issues in Federal Courts.

The obligation to decide substantive issues of State Law as the law is declared by the States Courts and Legislature is being ignored. Parties bearing the burden of proof will be deprived of meaningful discovery.

Summary Judgments will be resolved by the courts deciding disputed issues of fact.

The rulings by the lower Courts relating to discovery encourage a return to form over substance, and parties bearing the burden of proof will be denied an opportunity for meaningful reply or rebuttal in future cases.